

- VOLUME B -

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

THE JOHNS HOPKINS UNIVERSITY, : CIVIL ACTION
A Maryland Corporation, :
BAXTER HEALTHCARE CORPORATION, :
A Delaware Corporation, :
and BECTON DICKINSON AND :
COMPANY, A New Jersey :
Corporation, :

Plaintiffs :

v.

CELLPRO, A Delaware :
Corporation, :

Defendant :

NO. 94-105 (RRM)

- - -
Wilmington, Delaware
Wednesday, March 5, 1997
8:50 o'clock, a.m.

- - -

BEFORE: RODERICK R. MCKELVIE, U.S.D.C.J.

- - -

APPEARANCES:

POTTER, ANDERSON & CORROON
BY: WILLIAM J. MARSDEN, JR., ESQ.

Counsel for Plaintiffs

Official Court Reporters

1 into evidence simply to show that when Mr. Borbinaro
 2 arrived at CellPro in 1990, that CellPro was at that
 3 time engaged in the production of the 12.8 antibody.
 4 And as Mr. Jacob, in his testimony indicated
 5 yesterday, CellPro never ceased producing the 12.8
 6 antibody, notwithstanding the issuance of the '204
 7 patent.

8 MR. JANSEN: Your Honor, if I might, in
 9 response to Mr. Ware's comments.

10 THE COURT: All right.

11 MR. JANSEN: And we may read Mr. Borbinaro's
 12 testimony in during a portion of our case. He will
 13 indicate that CellPro received the hybridoma for its
 14 12.8 antibody prior to the issuance of the '204 patent.

15 MR. WARE: At this time, we will call John
 16 Osth from the Baxter Healthcare Corporation.

17 With the Court's permission, Mr. Ellis will
 18 examine Mr. Osth.

19 THE COURT: All right.

20 MR. ELLIS: Thank you, your Honor.

21 ***

22
23
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1 think you've heard of plastic IV solutions or IV
 2 solutions for hospital care, intravenous solutions.
 3 Baxter brought in plastic bag technology to allow that to
 4 be used on a more routine basis in hospitals and we
 5 provide those products worldwide.

6 We also make kidney dialysis equipment and
 7 disposables and we were the company that pioneered
 8 kidney dialysis. Brought that in, oh, 25, 30 years ago.
 9 In addition, we make heart valve and cardio
 10 products for the heart valve product. The area I'm in
 11 deals in transfusion medicine. We started in that area
 12 by making plastic blood bags, using the same IV solution
 13 technology, that is the same plastic technology to make
 14 those containers.

15 We now have moved from not only blood bags,
 16 but to centrifugal sphaeresis machines, which are the
 17 machines if you have been in an sphaeresis center where
 18 they collect blood and plasma on line.

19 We are also working on some new products in
 20 the blood substitute area. Very interesting technology
 21 and even into our area, which is cellular therapies and
 22 stem cell therapies.

23 Q. What is the particular business unit of Baxter
 24 with which you work, Mr. Osth?

25 A. I'm a member of the Immuno Therapy Division.

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1
2 PLAINTIFF'S TESTIMONY
3 CONTINUED
4

5 ... John Osth, having been duly
 6 sworn as a witness, was examined and
 7 testified as follows...

8 DIRECT EXAMINATION

9 BY MR. ELLIS:

10 Q. Good morning, Mr. Osth.

11 A. Good morning.

12 Q. Would you state your full name for the record,
 13 please?

14 A. My name is John Andrew Osth.

15 Q. And where do you reside, Mr. Osth?

16 A. I live in Laguna Hills, California. 25832 Desert
 17 trail, Laguna hills, California.

18 Q. And by whom are you currently employed?

19 A. Baxter Healthcare Corporation.

20 Q. What is Baxter Healthcare Corporation? Could you
 21 give the jury just some brief idea of what the company is
 22 and what it does?

23 A. Sure. Baxter Healthcare is a multi-national
 24 medical health care manufacturer. We make products that
 25 are primarily technology-oriented, that is, you know, I

1 Q. What is your position with that division?

2 A. I'm President of the division.

3 Q. And is that the division which is currently
 4 responsible for exploring the Cimiv technology?

5 A. Yes. That's exactly right.

6 Q. Mr. Osth, I'm going to ask you a few questions
 7 about your educational background.

8 Where did you attend college?

9 A. The U.S. Naval Academy at Annapolis.

10 Q. When did you graduate from Annapolis?

11 A. 1968.

12 Q. Was there something particular that you took with
 13 you from your Annapolis experience?

14 A. Absolutely. The one single lesson was honor. I
 15 might note that there have been a few cases lately that
 16 have not shown that at the Naval Academy, and myself and
 17 a number of my contemporaries are involved and very
 18 concerned about that and putting the Academy back on the
 19 road that it was on when I graduated in 1968.

20 MR. JANSEN: Objection, your Honor. Move
 21 to strike. Irrelevant.

22 THE COURT: Overruled.

23 BY MR. ELLIS:

24 Q. After you graduated from the Academy, Mr. Osth, did
 25 you then serve on active duty in the Navy?

- 1 A. Yes, I did.
 2 Q. For how many years?
 3 A. Nine years.
 4 Q. Now, at some point during your naval service, did
 5 you acquire an advanced degree?
 6 A. Yes.
 7 Q. What was that degree?
 8 A. I actually got two advanced degrees. I got a
 9 Master's in industrial engineering from the University
 10 of Illinois, and a Master's in business administration
 11 or an M.B.A. from the University of Chicago.
 12 Q. And when did you get your business administration
 13 Master's degree?
 14 A. 1978.
 15 Q. Are you married?
 16 A. Yes, I am.
 17 Q. Do you have children?
 18 A. Three.
 19 Q. When were you first employed with the Baxter
 20 Corporation, Mr. Osthe?
 21 A. I joined Baxter the first time in 1977, and there
 22 until late 1979.
 23 Q. And in what area did you work at that time?
 24 A. I worked in Corporate Cost Accounting.
 25 Q. And then did you leave Baxter for a period of time?

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- 1 A. Yes.
 2 Q. And did you work elsewhere in industry?
 3 A. Yes. I moved to Abbott Laboratories and worked
 4 in their Diagnostics Division.
 5 Q. And at some later point in time, did you rejoin
 6 the Baxter organization?
 7 A. Yes.
 8 Q. When?
 9 A. In 1985.
 10 Q. All right.
 11 And what was the nature of your job and your
 12 job responsibilities at that point?
 13 A. I was Vice President of Operations for the Pandex
 14 Laboratories, which was just acquired at that point in
 15 time by Baxter Healthcare.
 16 Q. What did they do?
 17 A. Pandex made instrumentation for the diagnostics
 18 market. We worked on making automated instruments for
 19 mass screening of hybridomas, which is a monoclonal
 20 antibody technology technique.
 21 Q. And did you receive a promotion at some point
 22 after that?
 23 A. Yes.
 24 Q. What was that?
 25 A. From that point, I was promoted to General Manager

- 1 of the Biotechnology Systems Group in Baxter.
 2 Q. And approximately what year was that?
 3 A. That was the beginning of 1988.
 4 Q. All right.
 5 And then what was the next position that you
 6 held with Baxter?
 7 A. From there I moved to Vice President of Business
 8 Development for Blood Substitute Group. I had mentioned
 9 earlier we're interested in hemoglobin solutions, which
 10 is solutions that are being designed to substitute for
 11 blood.
 12 Q. And when did you take over your current — when did
 13 you first become associated with the Baxter Immuno Therapy
 14 Division, which you now head?
 15 A. It was June of 1992.
 16 Q. And have you been with that division, the Baxter
 17 Immuno Therapy Division, continuously since that time?
 18 A. Yes, I have.
 19 Q. And at the time you came to the Immuno Therapy
 20 Division, did Baxter already have a license to the
 21 Civin patents?
 22 A. Yes, we did.
 23 MR. ELLIS: Plaintiff's No. 674, please.
 24 May I approach the witness, your Honor?
 25 THE COURT: Yes.

- 1 (Mr. Ellis handed the exhibit to the
 2 witness.)
 3 BY MR. ELLIS:
 4 Q. Mr. Osthe, can you identify that document for the
 5 jury?
 6 A. Yes. This is the agreement between Baxter and
 7 Becton Dickinson on Curt Civin's technology.
 8 Q. And when was that agreement entered?
 9 A. August 1990.
 10 Q. And do you know what division of Becton Dickinson
 11 provided Baxter the technology that was licensed under
 12 that agreement?
 13 A. Yes. It was Becton Dickinson Immuno Cytometry
 14 Systems or IDCs, as they call it.
 15 Q. What does immuno cytometry mean?
 16 A. Long word. Immuno cytometry stands for analyzing
 17 cells, large populations of cells through a technology
 18 called flow, and that's called immuno cytometry, where
 19 large populations of cells are actually, by using a
 20 fluid, they flow past a counter one at a time. And by
 21 using an antibody to attach to those cells and then
 22 labeling that antibody, you can count cells, you can
 23 segregate cells, whatever. It's very clever technology.
 24 Q. Now, does — in that time frame, did Becton
 25 Dickinson manufacture therapeutic products?

- 1 A. No, it did not.
 2 Q. Now, what was the Baxter Division on the other
 3 side of that transaction at the time the license was
 4 negotiated?
 5 A. At the time of the license, it was Fenwall
 6 (phonetic) Division.
 7 Q. What was the general business of Fenwall at that
 8 time?
 9 A. Fenwall makes products. I mention we're in the
 10 transfusion business. Fenwall makes products that are
 11 used by blood centers and hospitals to collect and
 12 handle and process blood, anywhere from the blood
 13 bag. And if you have doused blood, it's likely in a
 14 Fenwall blood container, through apheresis equipment or
 15 centrifugal equipment, through various other processing
 16 equipment to handle blood.
 17 Q. All right.
 18 Now, when you take a patent license, like the
 19 Becton Dickinson license, or when you get that license,
 20 Mr. Osth, is that enough to enable you to turn around
 21 the next day and start selling therapeutic products?
 22 A. No, not even close.
 23 Q. All right.
 24 What kind of effort does a company like
 25 Baxter have to engage in when it gets the kind of

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- 1 license that it got from Becton Dickinson?
 2 A. Subsequent to the license, you need to start
 3 developing a product that is – in this case, the – say
 4 biologics that are necessary to operate the system. You
 5 need to then enter into your own internal trials, to
 6 confirm that the product works according to your own
 7 specification.
 8 Then go through clinical trials outside of
 9 your organization, through safety trial, through efficacy
 10 trial. Just basically it's a number of more and more
 11 severe tests of the product, and then, of course, through
 12 licensure by whatever Government agency is licensing that
 13 particular product.
 14 Q. So even when you've got a product that you think
 15 works very well and your own internal testing indicates
 16 it works well, you can't just go out and start selling
 17 it?
 18 A. That is exactly right. There are other tests that
 19 the system must go through and other reviews that the
 20 systems must go through.
 21 Q. Now, during the first, let's say year to year and
 22 a half after Baxter acquired the license, can you tell
 23 me what was done with the Civin technology?
 24 A. The first year and a half would be through most of
 25 '91 and into a little bit of early '92.

- 1 We looked at various prototype systems,
 2 designing some early systems. We started with an
 3 instrument called our Maxsep (phonetic), which was at
 4 that time a system designed to negatively select or
 5 select out cells, such as a tumor cell. We tried to
 6 determine if we could use for, in this case, positive
 7 selection.
 8 We're looking at using Curt Civin's technology
 9 to specifically select the stem cell as opposed to get rid
 10 of a tumor cell. In working through that, we determined
 11 that that really would not be the best instrumentation or
 12 basic system to use. So we came up with another
 13 instrument, which we at that time called a Posi Sep
 14 (phonetic).
 15 Q. And approximately when in time was the first
 16 prototype of a CD34-positive selection device built by
 17 Baxter?
 18 A. The first one was in late '91, was the first
 19 Posi Sep in that time frame.
 20 Q. When it took the license from Becton Dickinson,
 21 had Baxter received any prototype of a CD34-positive
 22 cell selection system from Becton Dickinson?
 23 A. No, not at all. In fact, as I mentioned, Becton
 24 Dickinson is a diagnostic company, working in
 25 diagnostics. We were on the therapeutic side.

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- 1 Q. By the way, do you remember approximately how
 2 many different CD34 antibodies Baxter received from
 3 Becton Dickinson?
 4 A. Yes. I believe it was seven. It was six or seven,
 5 at any rate. It was certainly a decent number.
 6 Q. All right.
 7 And did the patent license that Baxter got
 8 from Becton Dickinson restrict Baxter to using just
 9 those Civin CD34 antibodies?
 10 A. Oh, no, no. The license was for use of any CD34
 11 antibody, but we just happened to get seven from Becton
 12 Dickinson.
 13 Q. But as you understood it, the license agreement
 14 left you free to go out and use anybody else's CD34
 15 antibody that you could acquire rights to?
 16 A. Oh, absolutely.
 17 Q. Now, once Baxter had come up with this first
 18 positive selection prototype that you referred to, I
 19 think you said it was around late '91, what did it do
 20 with that prototype?
 21 A. We gave it to Curt Civin to use in his laboratory.
 22 Q. All right.
 23 And what was the initial work that was done
 24 by Dr. Civin using that prototype?
 25 A. The initial work was testing in a laboratory, or

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1 let's say on the lab bench, testing to make sure that
 2 the system did, in fact, separate stem cells out from
 3 a normal cell population. So it was a functional cell
 4 separation testing.

5 Q. In other words, it caught the right fish?

6 A. Exactly. Exactly.

7 Q. All right.

8 And did that prototype catch the right

9 fish?

10 A. It caught the right fish. Yes, sir.

11 Q. All right.

12 Do you recall that Dr. Civin made a report in
 13 or about May of 1992? I think it was referred to
 14 yesterday. Reporting to the FDA that he had done some
 15 successful cell selections?

16 A. I don't remember the specific report. I know that
 17 it was made.

18 Q. All right.

19 Now, at that time, had there been any
 20 transplantation of cells selected with this prototype
 21 device to humans?

22 A. No.

23 Q. By the way, in the time frame that we were just
 24 talking about, the latter part of 1991, early 1992, was
 25 there an organization natural change at Baxter which

1 added.

2 Q. Now, after Dr. Civin made his report that he had
 3 actually used a device to get -- had gotten the right
 4 fish, gotten the right cells using that prototype device,
 5 did Baxter ask Dr. Civin whether he could try the device
 6 for some actual transplants?

7 A. Yes.

8 Q. Let me ask you this: Were such transplants
 9 carried out?

10 A. Yes, they were.

11 Q. Okay.

12 And approximately when were they carried
 13 out?

14 A. It was second half of 1992.

15 Q. Were those sort of official Baxter sponsored
 16 trials?

17 A. No, no. That was under a trial sponsored by Dr.
 18 Civin himself.

19 Q. Did Baxter continue engineering work on its device
 20 during this latter half of 1992 and continuing into
 21 1993?

22 A. Yes.

23 Q. And at some point in time, did Baxter start working
 24 on actually two different devices that used Dr. Civin's
 25 technology?

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1 affected the development of this particular product
 2 line?

3 A. Yes. Yes, there was.

4 Q. All right.

5 Would you just tell the jury a little about
 6 that?

7 A. Yes. I mentioned earlier that when the original
 8 license with Becton Dickinson was signed, it was signed by
 9 the Fenwall Division. And I mentioned the role of Fenwall
 10 Division in transfusion medicine.

11 That's a pretty vast array of issues to deal
 12 with in supporting blood centers on a worldwide basis.
 13 And to be straight, the projects, such as -- as the
 14 utilization of the Curt Civin technology were kind of
 15 falling down on the priority scale. I think we all know
 16 that in big companies, that there are lots of priorities.
 17 And big divisions which Fenwall is a big division, there
 18 are lots of priorities.

19 So we determined to put a focus on this plus
 20 some other immunology-based technologies and create the
 21 Immuno Therapy Division, to give them more focus and
 22 more emphasis.

23 Q. Did that decision lead to additional resources
 24 being invested over time in this project?

25 A. Yes, there were. There were additional resources

1 A. Yes, we did.

2 Q. All right.

3 What was the first of those devices?

4 A. The first other alternate device was called the
 5 Isolex 50. And this was -- sorry for the coding -- 50
 6 stands for 50 milliliters, which does not mean much
 7 outside of the context of what we're doing. But it means
 8 a fairly small-sized sample. It was designed for the
 9 research market is what I'm really getting at.

10 Q. And there was there also at some point another
 11 product that was under development?

12 A. Yes. When we finished the 50, we started
 13 developing the Isolex 300, which is for 300 milliliters,
 14 which is sized such that it could be used for an adult
 15 transplant.

16 Q. All right.

17 And when did -- strike that.

18 At some time did Baxter actually start
 19 selling the Isolex 50?

20 A. Yes. We started selling the Isolex 50 in about
 21 February of 1993. It might have been January,
 22 February; first quarter of 1993.

23 Q. And was it necessary to get any kind of approvals
 24 or do clinical trials for that particular device?

25 A. No. The Isolex 50, again, is a research device,

1 not designed for human transplants, so you do not need
2 clinicals or FDA approval to market that product.

3 Q. Has that product been a successful product?

4 A. Yes, it has globally, on a worldwide basis.

5 Q. Now, turning to the Isolex 300, the device that is
6 actually intended to produce cell suspensions that can
7 then be transplanted to humans, I believe you referred
8 to that as a therapeutic product; is that right?

9 A. Yes.

10 Q. And you testified before that before such a product
11 can be sold, that there is a formal process that has to
12 be gone through; right?

13 A. Yes.

14 Q. I am going to ask you to tell the jury a little
15 more about that process.

16 Once you've got a therapeutic product that
17 you think works fairly well, what do you have to do if
18 you want to be able to actually go ahead and sell that
19 product?

20 A. The - you have to go through a licensing process.
21 And that effectively is a three-step process of, first,
22 doing safety trials, which are called phase ones, or let's
23 call it step one, and then phase two, which are efficacy,
24 or step two. And then phase three are further efficacy
25 trials, in order to get licensure.

1 Q. All right.

2 Generally, what is the purpose of those
3 trials?

4 A. The purpose of the trials is - and taking it step
5 at a time, step one is to confirm that by utilizing
6 whatever the product is, you are not putting the patient
7 at undue risk. That's why it's a safety trial.

8 Phase two, or step two, is to confirm that by
9 using this now you've already shown that the patient is
10 not at undue risk, but now you are trying to show that,
11 in fact, you are providing some therapeutic value, or the
12 patient is getting better.

13 And phase three are typically a randomized
14 format, to confirm against some standard, even further,
15 that the product is efficacious or does what it is
16 supposed to do.

17 Q. And how long do such trials usually take before you
18 can actually get, in this country, FDA approval?

19 A. Altogether, all phase one, two and three?

20 Q. That's right. On a - arrange.

21 A. Say two, three, four years.

22 Q. And is the duration of the trials, that is to say
23 how long they last, is that something that's entirely
24 within the control of the company that wants to sell
25 the product?

1 A. Not entirely, no, it's not.

2 Q. Why is that?

3 A. Well, there are a couple of factors. First, that
4 the - the research that is being done can go faster or
5 slower. Also, the FDA often has questions, et cetera.

6 Q. Now -

7 A. About this.

8 Q. In doing the clinical trials, are you relying on
9 outside researchers to do the trials?

10 A. Yes, sir.

11 Q. And can you control their schedules?

12 A. No, sir.

13 Q. Okay.

14 With respect to the Isolex 300, which is the
15 Baxter therapeutic product, when, to the best of your
16 knowledge, did Baxter start its own clinical trials of
17 the therapeutic products?

18 A. I'm sorry. This is for the Isolex 300?

19 Q. That's right.

20 A. The Isolex 300, we started our first trial in mid-
21 1993, mid to late 1993.

22 Q. And when, if you know, approximately when had
23 CellPro started the clinical trials of its therapeutic
24 product?

25 A. It must have been early '91.

1 Q. And when did CellPro finally get the FDA approval
2 that Mr. Bloomberg was referring to?

3 A. They got it in December of 1996.

4 Q. So how long did it take them, approximately?

5 A. Five and a half years.

6 Q. Now, have the clinical trials of the Baxter Isolex
7 300 been successful?

8 A. Very successful, yes.

9 Q. And has Baxter actually started selling that Isolex
10 300 device outside of the United States?

11 A. Yes. It's on the market in Europe.

12 Q. And in Europe, did Baxter have to go through an
13 approval procedure?

14 A. Yes, we did.

15 Q. And to satisfy the European authority that the
16 product was safe and effective?

17 A. Yes, we did.

18 Q. And did CellPro also receive approval for its
19 product in Europe before it received approval in the
20 United States?

21 A. Yes, they did.

22 Q. Have physicians in this country, in the U.S., been
23 using the Isolex 300 for clinical trials with real
24 patients?

25 A. Yes, they have. In fact, we have a large number

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1 of them under way.

2 MR. JANSEN: Objection, your Honor. Move to

3 strike.

4 THE COURT: Overruled.

5 BY MR. ELLIS:

6 Q. By the way - and this is a question I was going to
7 ask you before, Mr. Osthe, what kind of - what technique
8 do the Baxter devices use to separate out the CD34 cells,
9 the fish, once they've hooked them with the CD34 antibody?

10 A. We use a technique that has - that utilizes a
11 magnetic bead. If I can take just a second to explain
12 that, we take an antibody - in fact, if you think of the
13 cell as my hand, although obviously it's a lot smaller,
14 it has on its cell surface antigens which are unique and
15 very identifiable and that was the particular uniqueness
16 and special nature of what Dr. Civin did, is found that
17 this particular CD34 antigen, cell surface antigen was on
18 stem cells and uniquely there. So we take an antibody,
19 put it onto that. And we attach to that a magnetic
20 particle. Very small. In fact, much smaller than the
21 cell. And it attaches by way of this antibody to the
22 cell. So it's now bound to the cell.

23 So just think I've it as kind of velcroed
24 in there for the moment.

25 And then it's very simple. We simply turn on

1 antibody?

2 A. No.

3 MR. JANSEN: Objection, your Honor.

4 THE COURT: Overruled.

5 BY MR. ELLIS:

6 Q. You've heard, or seen in CellPro papers a lot of
7 references to avidin/biotin technology.

8 A. Yes. Mm-hmm.

9 Q. You have to answer.

10 A. Sorry. Yes.

11 Q. And is that a - another different technology
12 for separating out the fish once you've caught them?

13 A. Yes, it is. It's a method of attachment.

14 Q. All right.

15 Does Baxter need that technology?

16 A. No, not at all.

17 Q. Did it need it in 1990?

18 A. We did not need it in 1990; as we had our bead
19 technology already.

20 Q. What kind of response has Baxter received from
21 doctors in the United States and Europe with respect to
22 the Isolex 300 product?

23 MR. JANSEN: Objection, your Honor.

24 THE COURT: Overruled.

25 THE WITNESS: Could you repeat the question,

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1 a magnet that pulls these cells off to the side. All the
2 other cells of which prior to that would be - 98 percent
3 of the cells are not stem cells. Only about 2 percent
4 are stem cells. All those other cells, we just simply
5 wash out. Very simple. We just wash out and put
6 another solution in.

7 Then turn Osthe magnet. These cells with
8 the magnetic beads go back into solution and then we
9 have also another technology to remove the bead from the
10 cell, turn the magnet on again. That pulls the now
11 separate magnets off to the side and you've got a
12 solution of stem cells.

13 Q. Now, was that a technology, that magnetic bead
14 technology that was in existence at the time Baxter
15 took a license from Becton Dickinson?

16 A. We had - no, not for positive selection.

17 Q. No. I'm asking, did magnetic bead technology, not
18 in the particular product, but was the general technique
19 known?

20 A. Yes, it was.

21 Q. And was it, in fact, being used by Baxter?

22 A. Yes, we were.

23 Q. Now, you've just described how the - how the
24 process works in the Baxter device.

25 Would the Baxter device work without CD34

1 please?

2 -----

3 BY MR. ELLIS:

4 Q. Yes. My question was, what kind of response has Baxter
5 received from doctors in the United States and Europe with
6 respect to the Isolex 300 product?

7 A. We've gotten very favorable responses. Our customers
8 love it.

9 Q. Have a number of the doctors who used the CellPro
10 device and the Baxter device reported their results in
11 the medical journals?

12 A. Absolutely.

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2 Q. And has a study been done of the published reports
3 in the medical journals?

4 A. Yes.

5 Q. And what does that study show?

6 MR. JANSEN: Objection, your Honor. Best
7 evidence. The witness is going to testify about a
8 study...

9 THE COURT: I got the objection.

10 MR. ELLIS: I'll rephrase the question.

11 THE COURT: I'm actually worried about hearsay
12 as opposed to best evidence.

13 Do you want to rephrase the question?

14 MR. ELLIS: All right. I'll try another way,
15 your Honor.

16 BY MR. ELLIS:

17 Q. Was the study done simply a comparison of what the
18 results published in medical journals was?

19 A. Yes, it was a compilation of results that were
20 previously published in medical journals.

21 Q. And is it your understanding that publications in
22 medical journals are generally reviewed, peer-reviewed,
23 before they are published?

24 A. Yes, they are. They are reviewed prior to
25 publication.

1 A. No. I'm sorry. Can you ask - I want to make sure

2 I've got that right.

3 Q. Sure.

4 During the time that you have been employed by
5 Baxter -

6 A. Mm-hmm.

7 Q. — are you aware of any situations where, at the
8 time Baxter acquired technology from somebody else, Baxter
9 did not intend to use that technology in a product that
10 it made?

11 A. No. Baxter, when it licenses technology, intends
12 to make products from that technology.

13 Q. All right.

14 Now, Mr. Osth, have you been personally
15 involved in the negotiation of any license agreements
16 under which Baxter gave certain other companies license
17 rights to the Civic patents?

18 A. Yes, I have.

19 Q. And what was the first company to take one of
20 those licenses from Baxter?

21 A. Applied Immune Sciences, or AIS.

22 MR. JANSEN: Objection.

23 THE COURT: You may not be able to visually
24 see him, but when you see him stand up, you might just
25 hesitate before you give an answer.

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1 Q. And do you have an understanding of what this
2 compilation of data from the published medical
3 journals showed?

4 A. Yes.

5 MR. JANSEN: Objection, your Honor. Hearsay.

6 THE COURT: Why don't you move on to another
7 topic and then come back and we'll talk about this during
8 the break.

9 MR. ELLIS: All right. That's fine, your
10 Honor.

11 BY MR. ELLIS:

12 Q. You talked a little while ago, Mr. Osth, about the
13 clinical trials that have been under way with respect to
14 the Baxter product. And has the FDA permitted Baxter to
15 file its final request for pre-market approval?

16 A. Yes, they have.

17 Q. And has that been done?

18 A. It has been done. It was done a week ago last - a
19 week ago Monday. We filed with the FDA for approval for
20 our Isolex technology, Isolex 300 technology.

21 Q. During your employment with Baxter, Mr. Osth, are
22 you aware of any situation where, at the time Baxter took
23 a license to a particular technology, Baxter did not
24 intend to use that technology itself in a product that it
25 was going to make?

1 THE WITNESS: Sure.

2 THE COURT: Overruled.

3 MR. ELLIS: Plaintiffs' Exhibit No. 421,
4 please.

5 THE COURT: If you can't see Mr. Jensen, I'll
6 get him to move the podium over a little bit.

7 THE WITNESS: I can see him.

8 THE COURT: If you see him stand up, hold off
9 on your answer until I get a chance to rule.

10 THE WITNESS: Yes, sir.

11 (PAUSE.)

12 MR. ELLIS: May I approach the witness, your
13 Honor?

14 THE COURT: Yes.

15 (Mr. Ellis handed an exhibit to the witness.)

16 BY MR. ELLIS:

17 Q. Mr. Osth, I've handed you a document that has been
18 marked Plaintiffs' Exhibit No. 421.

19 Is this a copy of the license agreement that
20 was negotiated with Applied Immune Sciences or AIS?

21 A. Yes, it is.

22 Q. All right.

23 When was that done?

24 A. It was December of 1992.

25 Q. All right.

1 So that was after — or a couple of years
 2 after the time that Baxter got the license agreement
 3 from Becton Dickinson; is that right?
 4 A. Yes. The license agreement was August of '90.
 5 Q. All right.
 6 Could you describe the business circumstances
 7 that gave rise to that license negotiation?
 8 A. Yet. In general, the — we knew that, or we were
 9 aware, per the discussions with Applied Immune Sciences,
 10 that they were proceeding on using stem cell selection
 11 in gene therapy and in certain AIDS or H.I.V.-type
 12 applications.
 13 We were not at the time focusing on those
 14 areas, so it was complimentary to what we were doing.
 15 And, in fact, mutually supportive of what we were doing.
 16 Q. All right.
 17 And at that time did Baxter expect that it
 18 would be competing head to head with AIS when it gave it
 19 that license?
 20 A. Not at all. As a matter of fact, it's important
 21 to understand in technologies that are as important as
 22 the Curt Cavin technology that there are vast applications
 23 of these. Any one company does not have the capability
 24 of proceeding on all of these. And this was a particular
 25 approach that was different than what we were doing, so

1 Q. Now, was there some kind of a pre-existing
 2 relationship between Baxter and AIS?
 3 A. Yes, there was.
 4 Q. All right.
 5 Would you just tell us what that was?
 6 A. Yes. We had an equity relationship in Applied
 7 Immune Sciences, which means we owned some stock in them.
 8 Q. All right.
 9 A. Of about 6, 7 percent.
 10 Q. And did that ownership of 6 or 7 percent of their
 11 stock give you the ability to control the license
 12 agreement?
 13 A. Not even close.
 14 Q. All right.
 15 A. No, it did not.
 16 Q. All right.
 17 A. Is the direct answer.
 18 Q. CellPro's expert witness, who we have not heard
 19 from yet, has filed a report in which he suggests that
 20 maybe this license wasn't negotiated at arm's length.
 21 Would that be a correct conclusion?
 22 MR. JANSEN: Objection, your Honor.
 23 THE COURT: Arguementive? Overruled.
 24 MR. JANSEN: Among others.
 25 THE WITNESS: I'm sorry. Would you repeat

1 it would allow the application of the technology across a
 2 broader spectrum.
 3 MR. JANSEN: Objection, your Honor. Move to
 4 strike. Nonresponsive.
 5 THE COURT: Did anybody hear that? I didn't —
 6 MR. JANSEN: I apologize, your Honor. I move
 7 to strike. Nonresponsive.
 8 THE COURT: Overruled.
 9 BY MR. ELLIS:
 10 Q. In deciding what royalty rate you were willing to
 11 take in that license, did you take into account what
 12 Baxter's own royalty obligations to Becton Dickinson
 13 would be? In other words, what it would have to pay
 14 upstream to Becton Dickinson?
 15 A. Absolutely.
 16 Q. And how did you take that into account?
 17 A. Well, we —
 18 MR. JANSEN: Objection, your Honor.
 19 Relevancy.
 20 THE COURT: Overruled.
 21 THE WITNESS: Okay. In answering the question,
 22 we, of course, wanted our — to get what we were going to
 23 pay Becton Dickinson, plus a very high reward, above and
 24 beyond that.
 25 BY MR. ELLIS:

1 the question, then, please?
 2 BY MR. ELLIS:
 3 Q. CellPro's expert witness on damages, Mr. Kiley,
 4 has suggested that maybe this Baxter/AIS license
 5 agreement wasn't negotiated at arm's length. And I'm
 6 asking whether, based on your experience negotiating
 7 that agreement, whether that is true or accurate?
 8 MR. JANSEN: Objection, your Honor. Lack
 9 of foundation.
 10 THE COURT: Overruled.
 11 THE WITNESS: The — I just wish somebody —
 12 that the person that said that had watched the
 13 negotiations. I was there, and they were — very
 14 contentious at times. I would describe them as
 15 absolutely arm's length.
 16 BY MR. ELLIS:
 17 Q. Now, as I understand the terms of that license, AIS
 18 agreed to pay Baxter a royalty rate of 16 percent based on
 19 50 percent of the value of their sales; is that correct?
 20 MR. JANSEN: Objection, your Honor.
 21 Relevancy.
 22 THE COURT: Overruled.
 23 THE WITNESS: Yes, that's correct.
 24 BY MR. ELLIS:
 25 Q. And what does that work out to as a percentage of

- 1 total sales?
- 2 A. Yes. This - this formula is very complicated. But
3 it does, to simplify it down, you pay 16 percent, but on
4 half of the content of the product, which means on total
5 sales it's 8 percent. That's for a therapeutic product.
- 6 Q. And in addition to that percentage royalty over time,
7 did AIS agree to make a cash up-front payment to Baxter?
- 8 A. Yes, they did.
- 9 Q. All right.

10 And how much was that payment?

- 11 A. That payment was \$750,000.

- 12 Q. All right.

13 Now, can you tell the jury what some of the
14 reasons, from your perspective as a businessman, what some
15 of the reasons are for wanting to have some payment in
16 cash up front?

- 17 A. There are a couple of reasons to want up-front
18 payments. But, certainly, one of them is to, because we
19 have our own investments in the technology, that we are
20 continuing on an ongoing basis and that additional money
21 can fund that investment. But another one, and it's
22 just as important, is it value dates the sincerity of
23 the company with which you're working, because you
24 might know, with a royalty, you don't have to pay a
25 royalty, necessarily, if the product never goes to

- 1 someone else?
- 2 A. The - yes, I will. The - you set a precedent.
3 Your first negotiation you set a precedent for all
4 subsequent negotiations. Also - and so that is one of the
5 reasons why you want to make sure it is valued - valued
6 very well.

7 In addition, this is technology that is still
8 in its early stages. And you don't know yet how valuable
9 it can be.

- 10 And we had thoughts, we had theories, we had
11 hopes. We didn't know. And we know a lot more now.
12 You want to establish a royalty at what would
13 be a very appropriate rate.

- 14 Q. And if your hopes or expectations for the
15 technology don't work out, what does the licensee pay?

- 16 A. Well, that's the interesting other side of that,
17 is because if it doesn't work, there are no product
18 sales. There's no royalty effectively.

- 19 Q. Now, at some later point in time, did Baxter grant
20 another license for the Civis patents to another company?

- 21 A. Yes, we did.

- 22 Q. All right.

23 And what company was that?

- 24 A. That was Systemics Corporation.

- 25 Q. All right.

- 1 market.

2 But an up-front payment is something certain.
3 So it's also that certainty of payment that is involved.

- 4 Q. Now, was the AIS license the first time Baxter
5 had - well, strike that. I should ask you a preliminary
6 question.

7 As you understood the Baxter license from
8 Becton Dickinson, did Baxter acquire exclusive rights to
9 manufacture and sell the antibody or products using the
10 antibody in the therapeutic field?

- 11 A. The field was - yes. The field was therapeutic
12 and therapeutic research.

- 13 Q. And was the AIS license the first time that you,
14 Baxter, actually gave up that exclusivity to the
15 therapeutic field?

- 16 A. Yes, that was the first time.

17 Q. Now, when you have exclusive rights to a particular
18 technology, or exclusive rights to that technology in a
19 particular field, is there some risk to you if you set
20 that royalty rate too low?

- 21 A. Oh, absolutely.

- 22 Q. All right.

23 Would you tell the jury, from a businessman's
24 perspective, why it is that you are concerned not to set
25 the royalty rate too low the first time that you license

- 1 And was that also a license that permitted
2 Systemics to manufacture a therapeutic product?

- 3 A. Yes, it was.

- 4 Q. All right.

5 And in that situation, did Baxter expect that
6 Systemics was going to be marketing a product - strike
7 that.

8 Let me ask you a question about time frame
9 first.

- 10 A. Mm-hmm.

- 11 Q. Do you recall approximately when the Systemics
12 license agreement was negotiated and signed?

- 13 A. It was signed in November of '93.

- 14 MR. ELLIS: May I approach the witness again,
15 your Honor?

- 16 THE COURT: All right.

- 17 (Mr. Ellis handed an exhibit to the witness.)

- 18 THE WITNESS: Thank you.

- 19 (Pause.)

- 20 BY MR. ELLIS:

- 21 Q. I am going to point out to you, Mr. Osthe, there are
22 a couple of pages near the end where some information was,
23 I think, removed by counsel. Complete copies of those
24 pages have now been given to the counsel for the other
25 side. I'm not asking you about those pages specifically.

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- 1 but just about the agreement.
 2 Is that basically a copy of the agreement
 3 that was negotiated and signed?
 4 A. Yes, it is.
 5 Q. All right.
 6 With Systemics?
 7 A. Yes, with Systemics.
 8 Q. And is that Plaintiff's Exhibit No. 4207?
 9 A. Yes, it's Plaintiff's Exhibit No. 420.
 10 Q. Now, at the time that agreement was signed, did
 11 Baxter understand that Systemics, under this license,
 12 would be marketing a product that was directly
 13 head-to-head competitive with the products that Baxter
 14 was marketing? I'm sorry. That Baxter was developing
 15 and intended to sell?
 16 A. Yes. They did not — they were not head to head.
 17 They were complimentary products.
 18 Q. What kind of product line did you understand that
 19 they were going to develop?
 20 A. They were aiming at a very interesting product, is a
 21 subset of CD34. Actually, CD34 and two other markers,
 22 which takes what is now already a small population of
 23 stem cells and actually, by using two other markers, gets
 24 to a population that is approximately 1 to 2 percent even
 25 of the stem cell population.

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- 1 Remember, I said stem cells are roughly 1 to
 2 percent of the cells. Now it's very — down to that,
 3 very specialized subset of unique applications.
 4 Q. Was that an area of application of this technology
 5 that Baxter itself had any interest in at that time?
 6 A. No. We had no interest in that. We were looking
 7 at the full CD34 population.
 8 Q. Did Baxter have any stock ownership in Systemics?
 9 A. No, we did not.
 10 Q. And am I right, Mr. Ost, in understanding that the
 11 royalty rate in the Systemics agreement is very similar
 12 to that in the AIS agreement?

13 MR. JANSEN: Objection. Relevance.

14 THE COURT: Overruled.

15 THE WITNESS: The royalty rate is the same
 16 in both agreements.

17 BY MR. ELLIS:

18 Q. That's to say the 16 percent of 50, or 8 percent?
 19 A. Yes. That's the math. It becomes an 8-percent
 20 royalty upon the total product.

21 I should add one thing, to make sure I'm clear
 22 on it, though. That's on therapeutic product. There's
 23 also a section in there that deals with research
 24 products. And that is — the math gets in — in here
 25 again, it's 8 percent on 50 percent, or 4 percent of

- 1 the total products sold into the research market.
 2 Q. I'm going to ask you, Mr. Ost, to think about
 3 two different licensing situations.
 4 One, where the licensee business, is not
 5 directly competitive with yours, and another, where the
 6 licensee is going to be competing head-on with you.
 7 Is there a difference in the way that you
 8 as a businessman approach those two situations?
 9 A. Oh, yes, very definitely.
 10 Q. Why is that?
 11 A. Well, let me go back to what I was saying a little
 12 bit earlier. In this kind of technology, CD34-type
 13 technology that Dr. Civin created, there are vast uses
 14 of it. And no one company can attack every one. It
 15 actually is an advantage to Baxter and to the world to
 16 have these areas, as many areas as possible, addressed.
 17 So if companies are aiming at different areas,
 18 that's more complimentary areas, that's good. And we want
 19 to do that.
 20 If, however — realize, again, this vast area,
 21 we're focusing on one area. If there's a company going
 22 after exactly that same area, that's taking profits from
 23 us. That's taking sales from us and taking value from us.
 24 Q. By the way, let me just go back to the Becton
 25 Dickinson license agreement.

1 Do you have an understanding, based on that
 2 agreement, as to what Baxter's obligations are for
 3 royalties to Becton Dickinson?

4 A. Yes, I do.

5 Q. All right.

6 And what, currently, does Baxter have to
 7 pay Becton Dickinson as a royalty rate?

8 A. Okay. Here goes the math again. It's — it's 11
 9 percent in half, because of the 50 percent, so it's 5-1/2
 10 percent in the first five years. Then there's some
 11 adjustments, where it's reduced a bit after that.

12 Q. All right.

13 But at least for the initial five years
 14 after there's a commercial product, it's 5-1/2 percent?

15 A. That's exactly right. For the first five years
 16 after becoming a commercial product, which are the
 17 critical years in any product life.

18 Q. If you were going into a negotiation with a
 19 head-to-head competitor, or somebody you expected to be
 20 a head-to-head competitor, and you knew that licensing
 21 them would give them ahead start over you in the market,
 22 is there something that would make a difference in the
 23 licensing negotiation?

24 A. That would absolutely make a difference.

25 Q. And why would it make a difference?

1 A. Well, not only with the head start and the
 2 advantage that – of timing that would take – be
 3 established – establish them in a position in the
 4 market, which would be very difficult for us to move
 5 into later on.

6 Q. Now, you understand that the plaintiffs claim here is
 7 that CellPro has helped itself to a head start in the
 8 market by proceeding to make a product without a license
 9 from Baxter, correct?

10 BY MR. JANSEN: Objection. Argumentative.

11 THE COURT: Overruled.

12 THE WITNESS: Would you say that again,
 13 please?

14 BY MR. ELLIS:

15 Q. You understand that the plaintiffs claim here is
 16 that CellPro has helped itself to a head start in the
 17 market?

18 MR. JANSEN: Same objection, your Honor.

19 MR. ELLIS: Can I just finish the question
 20 before the objection?

21 THE COURT: I've already overruled the
 22 objection, so you can restate it.

23 MR. ELLIS: Yes.

24 BY MR. ELLIS:

25 Q. Has the fact that CellPro – strike that.

1 Q. Will that continue to effect you in the future?
 2 A. It will continue to affect us, as it's also
 3 difficult in marketing a product to overcome a lead of
 4 another company.
 5 Q. Now, during the time that a company is doing the R&D
 6 to come up with a therapeutic product, and testing and
 7 improving that product and going through clinical trials
 8 and preparing its application to the FDA and up to the
 9 point it eventually gets approval to make that product,
 10 does it normally make a profit on the product?
 11 A. Not at all. It's investing in the product through
 12 that entire period of time.
 13 Q. On a rough order of magnitude, Mr. Osthe, what kind
 14 of investment is one talking about to bring a therapeutic
 15 product like this from conception to full market launch?
 16 A. Oh, the investment is millions of dollars. It could
 17 easily in a product like this, easily be 50 million or
 18 more.
 19 Q. So you are making an investment of up to 50 million
 20 or so and you are not making any profit while you're
 21 doing it; is that right?
 22 A. Not a penny during that period of time.
 23 MR. JANSEN: Objection, your Honor. This is
 24 leading.
 25 THE COURT: Overruled.

1 Do you understand that it's the plaintiffs'
 2 claim that CellPro helped itself to a head start by
 3 proceeding without a license from Baxter?
 4 A. Yes.
 5 Q. Now, has that fact injured or hurt Baxter?
 6 MR. JANSEN: Objection, your Honor. Leading.
 7 THE COURT: Overruled.
 8 BY MR. ELLIS:
 9 Q. How has it hurt Baxter?
 10 MR. JANSEN: Same objection, your Honor.
 11 THE COURT: I think it's – I think once
 12 you've articulated the objection, you don't need to
 13 repeat it.
 14 Do you remember the question?
 15 THE WITNESS: I'm sorry. Yes. Let's go back
 16 and repeat that, please?

17 THE COURT: This time don't object, please.

18 BY MR. ELLIS:

19 Q. Could you tell the jury how that has hurt Baxter?
 20 In general terms?
 21 A. In general terms, having – they put a product in
 22 the market ahead of us, and were able to put data into
 23 the market on that product.
 24 Q. And will that – has that affected Baxter already?
 25 A. That has affected us already, yes, it has.

1 BY MR. ELLIS:
 2 Q. Why do businesses put that money into a kind of
 3 product where they're not going to make any profit in
 4 the short range?
 5 A. Oh, because of the value in the long run. Companies
 6 do this all the time, do invest in the short run in a
 7 product that's going to provide great value in the long
 8 run.
 9 By the way, value is, of course, medical value
 10 and financial value, both. And since we're in the medical
 11 business, it's medical value also.
 12 Q. And when someone agrees in a license negotiation to
 13 pay 5 percent or an 8 percent or a 10-percent royalty,
 14 does that cost them anything at the time?
 15 A. No.
 16 MR. JANSEN: Objection. Lack of foundation.
 17 THE WITNESS: Sorry.
 18 THE COURT: Overruled.
 19 BY MR. ELLIS:
 20 Q. Now, putting aside any up-front payment that is made
 21 for the license, if the product does not succeed, or if
 22 the licensee never makes any sales, what does that royalty
 23 rate cost the licensee?
 24 A. It costs the licensee nothing.
 25 MR. ELLIS: Thank you, Mr. Osthe.

1 MR. JANSEN: Your Honor, I have a notebook of
2 exhibits I may cover with Mr. Osth. May I present one to
3 the Court?

4 THE COURT: All right.

5 MR. JANSEN: May I also hand one to Mr. Osth,
6 your Honor?

7 THE COURT: Yes.

8 Do you have a set for counsel?

9 MR. JANSEN: No. I can give him a list.

10 THE COURT: Why don't you give him a list?

11 MR. JANSEN: Sure.

12 Mr. Ellis, may I give you a list of the
13 exhibits?

14 MR. ELLIS: Yes.

15 MR. JANSEN: DX-232, DX-330, DX - I'm

16 sorry - DX-491, DX-437.

17 MR. ELLIS: Slow down just a second. Just a
18 minute. Sorry.

19 I got DX-491.

20 MR. JANSEN: Sure.

21 (Pause.)

22 THE COURT: To speed things up, why don't -
23 Mr. Ellis, you can stand next to the witness and if he has
24 a set of exhibits in front of him, you can follow along so
25 you'll see what he's got. And then as the exhibits are

1 Q. And also within your responsibilities are the
2 requirements - are the fact that you negotiate contracts
3 for the licensing of technology?

4 A. Yes.

5 MR. ELLIS: Excuse me, Mr. Jensen.

6 Your Honor, might I just pull the chair over
7 here?

8 THE COURT: There's one right behind you.

9 MR. ELLIS: Oh.

10 (Pause.)

11 THE COURT: Let me just ask a question. Mr.

12 Ware, earlier today you gave me a page citation for the
13 trial transcript. Can you give me that page citation
14 again?

15 MR. WARE: Yes, 109.

16 THE COURT: Thank you.

17 Sorry to interrupt. Go ahead.

18 THE WITNESS: Mr. Jensen, I should note, I
19 have a responsibility in licensing. I don't always do
20 all the negotiations myself. We have other people in our
21 Business Development Group that can sometimes carry those
22 out.

23 BY MR. JANSEN:

24 Q. And what, in general, are their responsibilities?

25 A. I'm sorry?

1 referred to, maybe people will get the legal staff to
2 pull the papers together so you can use them.

3 MR. ELLIS: I think that's a helpful
4 suggestion, your Honor.

5 (Mr. Jensen handed a notebook to the witness.)

6 THE COURT: You're not allowed to whisper
7 anything to him when you are over there; all right?

8 MR. ELLIS: I won't, your Honor.

9 CROSS-EXAMINATION

10 BY MR. JANSEN:

11 Q. Now, Mr. Osth, on your direct examination, you
12 indicated that you began with Baxter in about 1977?

13 A. Yes.

14 Q. And so you have been with Baxter a long time;
15 correct?

16 A. I should repeat. It's important to understand I was
17 with Baxter from '77 to '79 in Corporate Cost Accounting.
18 Then I moved to Abbott laboratories and was there for six
19 years or so, returning to Baxter in 1985.

20 So now I'm with Baxter almost 12 years.

21 Q. And now included within your responsibilities as
22 the President of the Immunotherapy Division is the
23 requirement that you develop policies for the licensing
24 of technology; correct?

25 A. Yes.

1 Q. And what, in general, are their responsibilities?

2 A. Well, it would depend on the particular assignment.

3 Q. They would do, for example, a financial analysis?

4 A. They might do that, yes.

5 Q. And they would look at things like cost projections?

6 A. They could. It certainly depends on the situation.

7 That's a - it's an interesting point. On every

8 negotiation, there are different key issues. And it can

9 very. It depends on timing. It depends on the

10 technology. It depends on familiarity, et cetera. So

11 there are a wide range of situations.

12 Q. Would you agree that business planning is not a
13 precise process?

14 A. I agree that it's not a precise process.

15 Q. Indeed, at times, business planning may be a very
16 imprecise process; correct?

17 A. It - yes. Yes. That's correct.

18 Q. Now, it has been a business practice of Baxter to
19 require its various divisions to prepare sales forecasts;
20 correct?

21 A. That is correct.

22 Q. And that's been a requirement of Baxter for at
23 least the number of years that you have been with Baxter;

24 correct?

25 A. Yes, that's true. There are annual plans put

- 1 together every year.
- 2 Q. Now, the Immunotherapy Division has an annual
3 budget; correct?
- 4 A. Yes.
- 5 Q. And within that annual budget there are sales
6 projections; correct?
- 7 A. Yes.
- 8 Q. And within the annual budget, there are also income
9 projections; correct?
- 10 A. Yes.
- 11 Q. And that also has been a practice required by the
12 management of the Baxter during the period of time that
13 you've been with Baxter; correct?
- 14 A. Yes.
- 15 Q. Now, periodically the Immunotherapy Division puts
16 together a business plan; correct?
- 17 A. Yes.
- 18 Q. Okay.
- 19 And for the period of time from 1990 through
20 1995, the Immunotherapy Division has prepared a number
21 of business plans; correct?
- 22 MR. ELLIS: I didn't hear the time frame.
- 23 MR. JANSEN: Sure.
- 24 BY MR. JANSEN:
- 25 Q. During the period of time from 1990 through 1995,

- 1 the Immunotherapy Division has prepared a number of
2 business plans; correct?
- 3 A. I think it's important to understand on that that
4 the Immunotherapy Division was not formed until the very
5 end of 1991. So I can't speak for the period prior to
6 that.
- 7 Also, I arrived in June of -- of 1992, which
8 is in my testimony. So other than that, there are a
9 number of plans, yes.
- 10 BY MR. JANSEN:
- 11 Q. Okay.
- 12 Now, financial forecasts are included within
13 the business plans; correct?
- 14 A. They can be. But certainly not absolutely.
- 15 Q. Okay.
- 16 A. And it depends. You know, every business plan,
17 every business -- you're referring to a business plan;
18 right?
- 19 Q. Right.
- 20 A. And can you define a business plan for me, please?
- 21 What do you mean by that?
- 22 Q. Well, I believe, Mr. Osth, you used the word
23 business plan earlier in your testimony.
- 24 A. Oh, okay.
- 25 Q. Okay.

- 1 A. Well, how would you define it?
- 2 Q. Well, what does a business plan mean to you, sir?
- 3 A. I'll tell you. It means it's an -- it's a
4 compilation of investments and income and projections over
5 a long period of time, such that you know what you are
6 going to invest in a product. You might be investing
7 research, R&D dollars. You might very well be investing
8 in capital. And you put that against revenues that would
9 be projected out into the future, and against any other
10 benefits or risks of the technology.
- 11 So it's such that you get to the end on a
12 product-by-product basis, get to a net profit, a
13 projected net profit.
- 14 Q. Now, you are familiar with a group within Baxter
15 called the Biotech Group; correct?
- 16 A. Yes.
- 17 Q. And, indeed, the Immunotherapy Division is a
18 division within the Biotech Group; correct?
- 19 A. It is.
- 20 Q. Okay.
- 21 Now, there is information with regard to stem
22 cell selection in the Biotech Group business plan;
23 correct?
- 24 A. Well --
- 25 MR. ELLIS: Objection, your Honor. The
- 1 question is unclear.
- 2 THE COURT: The objection is unclear.
- 3 MR. ELLIS: Right.
- 4 THE COURT: Overruled.
- 5 THE WITNESS: Could you define which plan you
6 are talking about?
- 7 BY MR. JANSEN:
- 8 Q. I was speaking now, Mr. Osth, about the Biotech
9 Group business plan.
- 10 A. The -- each business plan that is put together
11 focuses on whatever issues are important at the time.
- 12 It's virtually impossible, just said the
13 Biotech business plan. If you are talking about the one
14 that was just recently put together last few months, the
15 answer is yes.
- 16 Q. There have been a series of Biotech Group business
17 plans also; correct?
- 18 A. Yes.
- 19 Q. And, indeed, in the Biotech Group business plans,
20 there has been information with regard to stem cell
21 selection; true?
- 22 MR. ELLIS: Unclear, your Honor. Time
23 frame.
- 24 THE COURT: As to these objections, you
25 are better to deal with them on redirect.

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1 THE WITNESS: I'll just have to repeat the
 2 answer that I gave just a second ago, that various
 3 business plans focus on various issues. And I'd have to
 4 go back and look at the specific business plan to
 5 determine if there was anything on CD134 in it.

6 BY MR. JANSEN:

7 Q. Now, you are familiar with a division of Baxter
 8 called the Fenwall Division?

9 A. Yes.

10 Q. And prior to 1992, there was information regarding
 11 stem cell selection in the Fenwall business plans;
 12 correct?

13 A. I don't know.

14 Q. Do you recall, Mr. Osth, that you testified at an
 15 earlier point in time? There was some testimony that
 16 you gave at an earlier point in time?

17 A. Yes.

18 Q. Now, let me read a portion of that testimony:

19 "And prior to 1992, the information
 20 regarding stem cell selection techniques,
 21 products, antibodies, was included within
 22 the Fenwall Division business plans;
 23 correct, sir?"

24 And your answer was:

1 "Outside of the date, I am not
 2 sure of the exact date, or turnover,
 3 but, yes, earlier was Fenwall."

4 A. Then I'm sure that's true.

5 Q. Mr. Osth, do you have in front of you a document in
 6 the folder there that is Exhibit -- it's DX-1161?

7 A. DX-1161? Okay.

8 Q. And you've seen this document before; correct, Mr.
 9 Osth?

10 A. Can I take just a second to look through it?

11 Q. Sure.

12 A. It is 1161. This is the memo from Victoria Domes.

13 Q. Yes. Dated December 4, 1989.

14 A. Yes. I have seen this.

15 Q. And this document is a document that's called a
 16 preliminary screening document?

17 A. Yes, it is. Preliminary screening documents is an
 18 important part of -- of the Baxter evaluation program.

19 And it's important to understand the context. When we're
 20 at the very early stage -- for example, if somebody were

21 to call in, the next Dr. Civin were to call in today and
 22 say, We've got the next great technology, CD134, and we

23 would like you to look at it, we would first do a brief
 24 analysis that might be -- might be a week, might be more.

25 I don't know. And then we would put together at that

1 time a preliminary screening document which is sent
 2 around to various units of Baxter.

3 One of the things that's important to
 4 understand about the purpose of this document, its purpose
 5 is to define general business categories, very general,
 6 but not in detail, because its design is to alert all the
 7 Baxter -- units of Baxter.

8 One of the things that's important to
 9 understand about a company like Baxter, you know, right
 10 here in town, we've got DuPont, big companies, lots of
 11 areas. It's important that all areas are familiar with
 12 what's going on. So these documents go around to say,
 13 Hey, there's some work going on in this particular area.
 14 In my hypothetical case, CD134, if anybody else has any
 15 conflict with this or any reason to get involved, just let
 16 us know.

17 So it's primarily just kind of a flag to
 18 everybody to let them know that this is happening.

19 Q. Okay.

20 And Defendant's Exhibit No. 161, this
 21 preliminary screening document, indicated that the
 22 document had been approved by Tim Anderson. Do you see
 23 that at the last sentence of the first paragraph?

24 A. Yes.

25 Q. Okay.

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1 And Mr. Anderson is your boss?

2 A. He is now, yes. He was not in 1989.

3 Q. Okay.

4 Now, you have a confidence in Mr.
 5 Anderson's judgment on business matters?

6 A. Yes, I do.

7 Q. Let's take a look, briefly, at the last page of
 8 the document, this preliminary screening document of
 9 Baxter.

10 Do you see where it says risk?

11 A. Yes, but I'll tell you, honestly, I've got a
 12 Faxed copy. It's hard to read here. But what's your
 13 issue?

14 Q. We also have a Faxed copy, Mr. Osth. It is
 15 difficult to read.

16 A. Yes. Faxes are tough.

17 Q. Let's see the -- let's see how good we can do.

18 A. Yes. Good.

19 Q. The risks in this December 1989 Baxter business
 20 document are stated as follows:

21 "Significant scientific risk is
 22 associated with this opportunity. The
 23 therapeutic value of stem cell
 24 applications remains largely speculative."

25 Do you see that?

1 A. Yes, I do.
 2 Q. And it is your judgment that the therapeutic value
 3 of stem cell selection was something that was largely
 4 speculative as of 1989; correct?
 5 A. No, that is not my judgment. And I should repeat
 6 again — again, I want to repeat, these are documents
 7 that are put together very quickly after something is
 8 looked at, and specifically not meant to be in-depth
 9 analyses. And the fact that it was approved by Tim
 10 Anderson merely says that it was approved to be sent
 11 out.

12 Remember, to go back to the basics, what I
 13 had said was that this is really a flag to the entire —
 14 to the entire corporation. It is nothing more, nothing
 15 less. And...

16 Q. Let's take a look, if we can, again, Mr. Osthe, at
 17 some prior testimony that you've given:

18 "Question: The therapeutic value
 19 of stem cell selection was something
 20 that was largely speculative as of 1989;
 21 correct?"

22 And your answer was:

23 "I think that's true, yes. That is
 24 my judgment."

25 A. Mm-hmm.

1 higher the discount rate; correct, sir?
 2 A. That's typically the case, yes.
 3 Q. Now, you indicated in your direct examination,
 4 Mr. Osthe, that Baxter had entered into an agreement
 5 with Becton Dickinson; is that correct?

6 A. Yes.

7 Q. And as part of that, before Baxter entered into
 8 that agreement, they went out and they sought to
 9 determine the nature of the technology that Becton
 10 Dickinson had available; correct?

11 A. The nature of Curt Civin's technology you're
 12 talking about?

13 Q. Well, the nature of Curt Civin's technology and
 14 other technology with regard to stem cell selection;
 15 correct?

16 A. Oh, I'm sure they did, yes.

17 Q. That would be something that Baxter would do in
 18 the ordinary course of its business?

19 A. In the ordinary course of business, yes.

20 Q. Okay.

21 And let's refer for a second to a document
 22 which is also in your notebook, Mr. Osthe. It's

23 Defendant's Exhibit No. 702.

24 Do you have that, sir?

25 A. Just a minute. I assume these are in numerical

1 Q. That was your testimony, Mr. Osthe?
 2 A. Yes. I'm sorry. I apologize. What I was referring
 3 to when you said, was this sentence — was that my
 4 judgment, I said no, that was — I was reading that out
 5 of the — out of the memo.
 6 Q. Okay. All right.

7 It was your judgment that the therapeutic
 8 value of stem cell selection was something that was
 9 largely speculative as of 1989; correct?

10 A. There was speculation, yes.

11 Q. Now, you are familiar with the financial term
 12 discount rate, are you not, sir?

13 A. Yes.

14 Q. And what is a discount rate?

15 A. A discount rate is a factor applied to — typically,
 16 to a number — for example, if somebody were to say, I'll
 17 pay you a million dollars ten years from now, you would
 18 use a discount rate to adjust the value of that — of
 19 what you would pay for that right now.

20 What would you normally pay to — to get a
 21 million dollars 10 years from now? Would you pay
 22 \$900,000? \$500,000? Whatever. And it's — it's a
 23 judgment as to what that discount rate might be using
 24 various factors, such as risk, et cetera.

25 Q. And the more speculative that something is, the

1 order?

2 Q. We tried to put them in order.

3 A. Okay. 702. Yes, I have it.

4 Q. Okay.

5 A. A memo from Dr. Lake?

6 Q. To Tim Anderson.

7 A. Yes.

8 Q. You've seen this document before also; correct?

9 A. Yes, I have. Yes, I have. I'm confirming that.

10 Q. And this is — this is a document dated May 11th,
 11 1990?

12 A. Yes, it is.

13 Q. And that's a period of time relatively shortly
 14 before October of 1990?

15 A. Yes.

16 Q. And who is Bill Lake?

17 A. Bill Lake worked with — worked in the Fenwall
 18 Division at that time.

19 Q. And what was his position?

20 A. In 1990?

21 Q. Yes.

22 A. Boy, I don't — he was in the Fenwall Division. He
 23 was a scientist in the Fenwall Division. I'm not sure
 24 more than that.

25 Q. And this memorandum is to Tim Anderson?

- 1 A. Yes, it is.
 2 Q. And what was Tim Anderson's position at that time?
 3 A. I - I'm pretty sure he was President of Fenwall
 4 at that time. I'm not sure of the exact timing.
 5 Q. Okay.

6 Now, I -

7 THE COURT: why don't we take our morning
 8 break now. We'll take a 15-minute break, until ten of
 9 11:00.

10 MR. JANSEN: Thank you, your Honor.

11 (At this point the jury then left the
 12 courtroom, and the following occurred without the presence
 13 of the jury.)

14 THE COURT: You may step down.

15 During the period that you are on cross here,
 16 you shouldn't discuss your testimony with anybody. After
 17 cross is over, you can discuss it. But during this period
 18 of the break, you shouldn't talk about your testimony.

19 All right? I'm going to stand. Anybody that
 20 wants to sit, can sit.

21 I've gone back and looked at this issue about
 22 the testimony about the NIH funding.

23 MR. BLOOMBERG: Your Honor, may I address that
 24 briefly, before you -

25 THE COURT: All right. That's fine.

1 MR. BLOOMBERG: - address it.

2 The point I would make with respect to NIH
 3 funding is that that's an issue that Mr. Ware raised
 4 during his direct examination of Dr. Civin, at Page 150
 5 he asked Dr. Civin about the correction page on the first
 6 page of Exhibit 1, which is the '680 patent. And at Pages
 7 158 to 159, he asked Dr. Civin if any of the NIH funding
 8 at Hopkins was done in connection with his work regarding
 9 Civin patents. And Dr. Civin said no.

10 On cross-examination, he - having been shown
 11 other NIH grants that he had access to with the cancer
 12 center, said that he had forgotten that NIH funding. So
 13 I think it was appropriate cross-examination in view of
 14 Mr. Ware's initial examination on the topic.

15 MR. WARE: I would just point out, your
 16 Honor -

17 THE COURT: Actually, it sure sounds like
 18 Whack-A-Mole to me.

19 Let's go back and talk about obligations a
 20 party has in litigation to disclose facts and contentions.

21 And I talk a lot about interrogatories, because
 22 usually people look to interrogatories to help get notice
 23 as to what position a party is going to take in litigation.
 24 And we know there are other tools, including

25 expert reports and the pretrial order. And I've gone back

1 through the pretrial order and I do not see anything in
 2 there about references to NIH funding being relevant to
 3 reasonable royalty calculation.

4 Are you aware of any statement in the pretrial
 5 order that you are going to rely on facts relevant to
 6 that, to prove any matter in issue?

7 MR. BLOOMBERG: I don't think there's a
 8 specific reference to NIH funding.

9 THE COURT: And, in fact, if you go back and
 10 look at the pretrial order, there aren't references to
 11 many facts that you intend to put in issue. It seems to
 12 me that's a real substantial deficiency and it's a real
 13 invitation to mischief at the trial.

14 Now, I've gone back through the expert report
 15 that I was given and I don't see any reference in there
 16 to NIH funding.

17 Do you have any other basis for showing me
 18 that you put the other side on notice that you will
 19 argue about NIH funding with regard to the calculation
 20 of reasonable royalty? If you don't, I don't think it's
 21 appropriate to argue in the case.

22 Now, with regard to other issues that are
 23 popping up, parties should expect that I'll do the same
 24 thing. I'm going to go through the pretrial order. I'm
 25 going to see the extent to which parties put the other

1 side on notice in the pretrial order that they intended
 2 to raise issues, make contentions, offer facts into
 3 evidence and argue issues to the jury. And if they are
 4 not in the pretrial order, I'll preclude you from doing
 5 it.

6 I have gone through this issue of the statement
 7 made yesterday at Page 109 in the transcript, that is the
 8 Court Reporter recorded it as follows:

9 "In correspondence from Baxter, and
 10 the presentation that Baxter made to
 11 another, they said CellPro was not
 12 infringing."

13 Can we look at that letter that, as I
 14 understand it, CellPro is relying on, see where it is in
 15 the letter that Baxter said CellPro was not infringing?

16 MR. WARE: I have the - I actually have the
 17 series of letters, because the Court had asked -

18 THE COURT: Well, I've got them, because I
 19 think they are attached to the bench memo.

20 MR. WARE: I haven't seen them.

21 THE COURT: Where is there in this letter a
 22 statement by Baxter that CellPro is not infringing?

23 MR. BLOOMBERG: Your Honor, I think the
 24 statement is in the proceedings before the Washington
 25 Court.

1 THE COURT: Well, was there a basis in fact
 2 for telling the jury that there was correspondence from
 3 Baxter that said CellPro was not infringing, because if
 4 it's not in that correspondence, it needs to be in some
 5 other correspondence or there's no good-faith basis in
 6 fact for making the statement to the jury.

7 MR. BLOOMBERG: I think the statement in
 8 the letter is that no infringement lawsuit or claim
 9 against our potential partner and supplier was
 10 contemplated, threatened or even mentioned.

11 THE COURT: Right. And you'll concede that
 12 there's some difference between that statement and the
 13 statement that you made to the jury? I'll reread the
 14 statement that the Court Reporter took down. That is,
 15 correspondence from Baxter, and the representations that
 16 Baxter made to others -

17 MR. BLOOMBERG: I think -

18 THE COURT: They said CellPro was not
 19 infringing.

20 MR. BLOOMBERG: I think what I said was
 21 representations that Baxter made to another Court and
 22 that was a reference to the Washington Court
 23 proceedings, your Honor.

24 THE COURT: Well, you don't read that sentence
 25 as making a representation there was correspondence where

1 (Court resumed after the recess, and the
 2 following occurred without the presence of the jury.)

3 THE COURT: Before the break, we had a
 4 question about hearsay, what I thought was a hearsay
 5 issue, and that is the testimony about certain public
 6 cases.

7 MR. ELLIS: I won't press it, your Honor.

8 THE COURT: So you back off that?

9 MR. ELLIS: Yes.

10 MR. WEISS: We have a problem here.

11 THE COURT: All right.

12 MR. WEISS: Somehow the system with the videos
 13 got rerouted, somehow because their system wouldn't work.
 14 As a result, now our system does not work. I am unable
 15 to use the videos with regard to cross-examination.
 16 We've, of course, spent a lot of time, a lot of money on
 17 this, and now we can't do it. It's rerouted through
 18 theirs. We didn't know about this until yesterday.

19 They brought in some system, I guess, that
 20 does not work with the other monitors.

21 THE COURT: You may want to see if we can fix

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 1 Baxter tells you you're not infringing? That's how I
 2 read it and that's how I think a reasonable juror would
 3 have understood it when they heard it.

4 Now, here's the message. I'm going to look at
 5 that pretrial order as a definition of what you intend to
 6 put into evidence in this case and the arguments you
 7 intend to make to the jury and if they are not in that
 8 pretrial order and if they are not otherwise disclosed in
 9 expert reports or interrogatories, I'm going to preclude
 10 you from doing it.

11 It's time to stop. It's time for you to
 12 recognize you have an obligation to put the other side
 13 fairly on notice as to what your positions are. If you
 14 don't, I won't let you put it on. All right?

15 MR. BLOOMBERG: Yes, your Honor.

16 THE COURT: Take a break.

17 (Short recess taken.)

1 it during the lunch break.

2 MR. WEISS: Thank you, your Honor.

3 MR. WARE: Your Honor, there's an issue coming
 4 up on a series of exhibits that will be hard to do other
 5 than at sidebar.

6 THE COURT: Give me the exhibit numbers.

7 MR. WARE: Yes. I can give you copies also.
 8 The exhibit numbers are 232, 1164, 284.

9 (At this point the jury entered the courtroom
 10 and took their seats in the box.)

11 THE COURT: All right. We're back. We're
 12 away.

13 MR. WARE: I think it's 709.

14 THE COURT: Do you want to identify the
 15 objection you have with regard to those? I have a
 16 notebook here.

17 MR. WARE: Okay. 401, 403 and 408.

18 THE COURT: All right. Let me take a look
 19 at them.

20 MR. WARE: Okay.

21 MR. JANSEN: May I proceed, your Honor?

22 THE COURT: Yes.

23 BY MR. JANSEN:

24 Q. Mr. Oath, before the break, we were discussing
 25 Defendant's Exhibit No. 702.

1 Do you still have that in front of you?
 2 A. Yes, I do.
 3 Q. And in the first full paragraph after the -- after
 4 the subtitle in the middle of the page, it says:
 5 "Becton Dickinson has acquired a
 6 total of seven anti-CD34 hybridomas cell
 7 lines, which consist of the My-10 line
 8 from Curt Civin and six other lines
 9 acquired from Peter Lansdorf in
 10 Vandorf (phonetic)."

11 Do you see that?

12 A. Yes.

13 Q. And that was what you testified to with regard to
 14 those -- those cell lines on your direct examination?

15 A. Yes.

16 THE COURT: May I interrupt for a second?

17 Mr. Ware, I probably don't have those
 18 documents here, so maybe I could get them from you.
 19 All right. Sorry to interrupt. Go ahead.

20 BY MR. JANSEN:

21 Q. Now, do you know what Becton Dickinson paid Dr.
 22 Lansdorf for the Lansdorf cell lines?

23 A. No, I don't.

24 Q. Further on in that paragraph, do you see where it
 25 indicates that Johns Hopkins had a patent application

1 Q. Consequently, amongst the technology that Baxter
 2 was evaluating in connection with its licensing
 3 agreement with Becton Dickinson was the Lansdorf
 4 hybridomas, as well as a patent application or patent
 5 for chymopapain?

6 A. Yes. It says it here. I didn't know it was
 7 coincident, but, yes, it says that here.
 8 Q. Now, who would have more -- let me ask you this:
 9 Do you know Dr. Lake?

10 A. Yes, I do.

11 Q. And who would have more experience in connection
 12 with evaluating the value of technology, yourself or Dr.
 13 Lake?

14 A. Oh, I'd -- that's a -- a vastly -- vastly different
 15 question. Dr. Lake is a superb scientist with much
 16 experience. I'm a businessperson.

17 What you are getting are two distinctly
 18 different opinions and different approaches on things.
 19 Not contradictory, necessarily, but just different
 20 viewpoints.

21 Q. And would you please turn to the -- Page 4 of
 22 Defendant's Exhibit No. 702?

23 A. Yes. I'm on Page 4.

24 Q. And do you see the section that says, overall
 25 summary?

1 related to chymopapain?

2 A. No. Help me, please.

3 Q. Sure. It's actually in the next sentence.

4 A. Oh, I'm sorry. I was looking further down. Yes, I
 5 see that.

6 Q. Okay.

7 And consequently, you would agree that
 8 amongst the technology that Baxter was shown that was
 9 possessed by Becton Dickinson was technology that related
 10 not only to the Curt Civin My-10 cell line, but also the
 11 Lansdorf cell lines and the chymopapain patent
 12 application; correct?

13 A. I apologize. Would you please repeat that? I
 14 want to make sure I answer your question directly.

15 Q. Okay. Let's just -- let me just read the sentence
 16 to you.

17 A. Okay.

18 Q. "Associated with the Civin line, AD has
 19 licensed the issued Hopkins patent and
 20 the AD people also refer to additional
 21 CPT's in a more recent Hopkins patent
 22 application related to the use of
 23 chymopapain."

24 Do you see that?

25 A. Yes.

1 A. Yes, I do.

2 Q. And in that section, in the first sentence, it says:

3 "In my opinion, AD has property
 4 which would be available for transfer
 5 to Baxter in the form of basic research
 6 data files and notebooks, manufacturing
 7 purification process, SOP/ZQA tests,
 8 stability and monoclonal antibody
 9 technology data, anti-CD34 monoclonal
 10 hybridoma cell lines which would justify
 11 the anticipated up-front contract
 12 payment and would save a minimum of
 13 three to five years Baxter development."

14 Do you see that?

15 A. Yes.

16 Q. And was that -- was that -- scratch that.

17 Was a saving of development effort one of
 18 the things that Baxter considered in connection with its
 19 determination of a desire to license technology from AD?

20 A. There are always a large number of factors in
 21 determining -- acquiring technology. I really -- I've --
 22 I'm familiar with this particular issue, and on this
 23 particular one, the three- to five-year development time,
 24 I have a disagreement with my good friend, Dr. Lake, who
 25 I know very well. And he and I are good old friends and

- 1 we've disagreed on many good issues, too, and have a -
 2 have a - have - always have a good discussion on
 3 issues.
 4 So we have - it's - it's always a
 5 consideration.
 6 Q. Now, you've sat at the negotiating table with regard
 7 to license negotiations; correct?
 8 A. Yes.
 9 Q. And in connection with the times that you've sat at
 10 the negotiating table, you've considered the value of
 11 technology that Baxter has; correct?
 12 A. I have considered the value of Baxter technology,
 13 yes.
 14 Q. And you've also considered the cost of developing
 15 that technology; correct?
 16 A. I absolutely have considered the value of - the
 17 cost to develop technology.
 18 Q. And you've also considered whether the technology
 19 that Baxter has is technology that has commercial
 20 application; correct?
 21 A. The - that is always a consideration, is what is
 22 the commercial application or value of any technology,
 23 whenever you are discussing it in any context.
 24 Q. You've also considered whether the Baxter technology
 25 is technology that works; correct?

- 1 A. Yes.
 2 Q. And, lastly, you've also considered whether there
 3 are alternative technologies; correct?
 4 A. Yes.
 5 Q. Now, further on in the - in the paragraph, it's
 6 somewhat near the middle, there is a sentence that states:
 7 "One agreement issue which I believe
 8 is extremely important to the success of
 9 our stem cell program is that any
 10 contract with BD - and you understand it to be
 11 reference to Becton Dickinson?"
 12 A. Yes.
 13 Q. - "should provide Baxter with access
 14 to all BD monoclonal cell lines which
 15 would be useful or necessary for the
 16 development of a stem cell selection
 17 system."
 18 Do you see that?
 19 A. Yes.
 20 Q. Okay.
 21 And you would agree with that assessment by
 22 Dr. Lake?
 23 A. No, not necessarily. I - I don't really know the
 24 context in which he's discussing this in detail, so I
 25 really can't say whether I would agree with that statement

- 1 in and of itself or not.
 2 Q. And you didn't make any independent assessment
 3 with regard to this statement?
 4 A. Not on this issue.
 5 Q. And did you ever understand that Dr. Lake was
 6 essentially put in charge of evaluating this technology?
 7 I'm sorry.
 8 Do you understand that Dr. Lake was put in
 9 charge of evaluating this technology on behalf of Baxter?
 10 A. Dr. Lake wrote this memo, yes.
 11 Q. And this memo is in the nature of a due diligence
 12 memo; correct?
 13 A. Due diligence of a sort, yes.
 14 Q. All right.
 15 You never told Dr. Lake that you disagreed
 16 with the information contained in this memorandum;
 17 correct?
 18 A. I think it's important to note, and I'm sure you're
 19 aware of the timing of this. In fact, I think you read
 20 that it was dated May 11th, 1990. And I know you and I
 21 have discussed the fact that I joined the division in June
 22 of 1992, long after this memo was written.
 23 Q. Now, Dr. Lake is still an employee of Baxter?
 24 A. No, he is not.
 25 Q. And when did Dr. Lake leave?
- 1 A. Well, I - three to four years ago. I'm not sure.
 2 I'd say about three years ago.
 3 Q. Now, near the end of the over - of the overall
 4 summary, the last sentence states:
 5 "The BD scientists concurred with
 6 this assessment and agreed that the
 7 contract should be structured around
 8 the field of stem cell selection as
 9 opposed to anti-cx34 antibodies."
 10 Do you see that?
 11 A. Yes, I do.
 12 Q. Okay.
 13 And you would agree that that was the
 14 assessment of Dr. Lake at or around May 1990?
 15 A. I am sure - I can only say I'm sure if he wrote
 16 it, that that was his assessment.
 17 Q. You never - you never told Dr. Lake that you
 18 disagreed with that assessment; correct?
 19 A. Not that statement.
 20 Q. Now, on the last page, in the second paragraph, it
 21 states:
 22 "There are several less positive
 23 technical aspects to the BD development
 24 program."
 25 Do you see that?

- 1 A. Yes, I've got it.
 2 Q. And the first of those less positive aspects was
 3 the Civin — was a reference to the Civin My-10
 4 antibody?
 5 A. Yes.
 6 Q. And how that — and how that antibody was produced?
 7 A. Yes, I see it.
 8 Q. And the — the quality of the technology that
 9 Baxter had available to it, or was being offered, would
 10 be one of the considerations that you would look to in
 11 evaluating whether Baxter wanted that technology;
 12 correct?
 13 A. I can answer the question in general, that generally
 14 we look at the value. In fact, whenever we're considering
 15 any technology, we'd look at how it will fit into what we
 16 already have at Baxter, what already exists and whether it
 17 makes sense or not or how — how well and how smoothly
 18 that transition will take place. Yes.
 19 Q. And the quality of products that are being offered
 20 to Baxter is one of the — one of the things that you look
 21 to in determining what royalty rate Baxter would pay for
 22 certain technology; correct?
 23 A. Oh, not necessarily. Again, there are so many
 24 factors we can't count them in evaluating royalty rates.
 25 Q. But, certainly, whether technology being offered to

- 1 you worked would be one of the things that you would look
 2 to; correct?
 3 A. Not necessarily, but let's understand that the
 4 antibodies that we're talking about here are not the
 5 technology. We are not — our license, very specifically,
 6 says we can use any antibody, not necessarily limited to
 7 the particular antibodies that were being offered by
 8 Becton Dickinson.
 9 Q. Okay.
 10 A. We're not restricted to that.
 11 Q. We'll go through the license agreement in a short
 12 time, Mr. Osti.
 13 Do you see that there's a reference in the
 14 middle of the paragraph that says:
 15 "The My-10 antibody has a stability
 16 problem?"
 17 A. Yes, I see the statement.
 18 MR. ELLIS: Objection. Out of context.
 19 THE COURT: Do you want to read the balance
 20 of the sentence? Is that what you'd prefer?
 21 MR. JANSEN: Sure, your Honor. The sentence
 22 actually says:
 23 "The My-10 antibody is plagued
 24 by a stability problem which is
 25 poorly understood."

- 1 MR. ELLIS: Also 401, your Honor.
 2 THE COURT: All right. Can you identify for
 3 me in the pretrial order where you put plaintiffs on
 4 notice that you would be making arguments with regard
 5 to My-10 in this context?
 6 MR. JANSEN: It's — your Honor, it's in the
 7 nature of what the value of the technology is.
 8 THE COURT: I understand that. Can you show
 9 me in the pretrial order where you put plaintiffs on
 10 notice that you would be making arguments about the My-10
 11 in this context?
 12 MR. JANSEN: It has to do — well...
 13 THE COURT: I'm not asking what it's relevant
 14 to. I'm asking where you put plaintiffs on notice that
 15 you would make arguments about it.
 16 MR. WEISS: Your Honor, we cited the
 17 Georgia-Pacific case.
 18 THE COURT: Give me a paragraph, give me a
 19 page in the pretrial order.
 20 MR. WEISS: I can give you the page where we
 21 cited the Georgia-Pacific case.
 22 THE COURT: Why don't you move to a new topic?
 23 MR. JANSEN: Very well, your Honor.
 24 BY MR. JANSEN:
 25 Q. Mr. Osti, let's move to Plaintiffs' — Plaintiffs'

- 1 A. Yes.
 2 Q. Now, the BD patent rights were part of the
 3 agreement between Johns - between Becton and Baxter;
 4 correct?
 5 A. Restate that, please.
 6 Q. The BD patent rights were part of the agreement
 7 between Becton and Baxter; correct?
 8 A. The BD patent rights? Yes.
 9 Q. Right.

10 And those BD patent rights were set forth
 11 in Appendix A, and they are stated to be an Application
 12 Serial No. 517101, do you see that, dated 5/1/90?
 13 A. I see the serial number, yes.
 14 Q. The title, that was a subset of progenitor cells.
 15 Do you see that?

16 A. Yes.

17 THE COURT: Let me go back to my earlier
 18 comments. To the extent you can also find something in
 19 Mr. Kiley's report that speaks to the same topic, you
 20 can rely on it to go back and speak to the subject
 21 matter.

22 MR. WEISS: It is in there.

23 THE COURT: Do you want to cite a page and
 24 a paragraph, I'd appreciate it.

25 MR. WEISS: Sure. We also, at Page 6 of the

1 pretrial order, the first paragraph.

2 THE COURT: Let me - I'm in Volume 1, Tab...
 3 MR. WEISS: I'm sorry. I'm looking at the
 4 document -

5 THE COURT: This is a document called the
 6 pretrial order by which parties put the other party on
 7 notice on what they intend to argue and prove at trial
 8 and we're working with this document so each side is
 9 treated fairly in terms of notice as to what goes on in
 10 terms of the trial.

11 What page are you referring to?

12 MR. WEISS: Page 6, which incorporates the
 13 expert reports.

14 THE COURT: Page 6 of what?

15 MR. WEISS: Page 6 of the pretrial order.

16 THE COURT: Of the report itself?

17 In Mr. Kiley's report, what page are you
 18 looking at?

19 MR. WEISS: I have to pull that, your Honor.

20 THE COURT: All right. Sorry to interrupt.
 21 You can go back to where you were, and if you can cite
 22 me a page and a paragraph for Kiley, we'll reopen the
 23 issue.

24 MR. JANSEN: thank you, your Honor.

25 THE WITNESS: Mr. Jansen, may I ask you a

1 question?

- 2 MR. JANSEN: Sure.
 3 THE WITNESS: At the top of this Page 360315A,
 4 because with a Fax - it says a subset of -
 5 BY MR. JANSEN:
 6 Q. Human progenitor cells.

7 A. Thank you. I couldn't read the word.
 8 Q. That was, as far as you understood, a BD patent;
 9 right?

10 A. As far as I know. Yes. As far as I know, it is.
 11 Q. Okay.
 12 This is a license agreement under which Baxter
 13 is operating?
 14 A. I understand. I understand that very well. I'm
 15 just trying to - we're referring to certain specific
 16 sentences. I'm trying to make sure I answer it exactly
 17 right.

18 Q. And this is a patent application that Baxter
 19 acquired rights to from Becton Dickinson; correct?
 20 A. Yes.
 21 Q. And it's your understanding that this patent
 22 application was also followed - filed in Europe;
 23 correct?
 24 A. I believe it was. You're kind of on the edge of
 25 my knowledge. I'm not sure.

1 Q. Okay.
 2 And you would agree that Baxter has a
 3 world - has worldwide rights to that patent
 4 application?

5 A. Yes.

6 Q. Now, Baxter doesn't have any worldwide rights to
 7 any Civis patents at issue -

8 MR. ELLIS: Objection. 401, your Honor.

9 THE COURT: Overruled.

10 THE WITNESS: I'm sorry? Would you restate
 11 the question?

12 BY MR. JANSEN:

13 Q. Sure. Baxter does not have worldwide rights to
 14 any Civis -

15 THE COURT: Just a second. Mr. Weiss has a
 16 cite for me.

17 MR. WEISS: Yes, your Honor. Page 5 of Mr.
 18 Kiley's supplemental rebuttal expert report of Thomas
 19 Kiley.

20 THE COURT: Paragraph 27

21 MR. WEISS: Paragraph 4.

22 THE COURT: 47 All right.

23 MR. WEISS: And Paragraph 2.

24 THE COURT: All right. I'll read them.
 25 You can go ahead.

1 MR. JANSEN: Thank you, your Honor.
 2 BY MR. JANSEN:
 3 Q. Mr. Ost -
 4 A. Yes
 5 Q. - Baxter does not have any worldwide rights to
 6 any Civin patents at issue in this proceeding, because
 7 those patents have not been filed around the world;
 8 correct?
 9 A. I apologize. It's been a while since I've been
 10 involved in details of this. We do not have rights
 11 outside of the U.S.
 12 It's my understanding we do not. The
 13 particular cause - it has been a while.
 14 Q. And so, consequently, under this Becton Dickinson
 15 patent application, Baxter acquired rights outside of
 16 the United States; correct?
 17 A. Say that again.
 18 Q. Sure. Consequently, under this Becton Dickinson
 19 patent application that's referred to in the Becton -
 20 Becton Dickinson Baxter license agreement, Becton
 21 Dickinson gave Baxter rights around the world to a Becton
 22 Dickinson patent application; correct?
 23 A. I, again, I want to make sure that it's understood.
 24 I can't - it's been a while since I've gone into the
 25 details, as I'm not absolutely sure of the global rights

1 on these. And I don't want to quote anything unless I'm
 2 sure of it.
 3 Q. Now, the acquisition by Baxter of the BD patent
 4 rights was something that was important to Baxter;
 5 correct?
 6 A. Yes.
 7 Q. Now, further on in the Becton Dickinson Baxter
 8 license agreement is a reference to Johns Hopkins
 9 University patent rights.
 10 Do you see that, sir?
 11 A. Could you give me the page number, please?
 12 Q. Sure. It's the second page, Paragraph 1.2.
 13 A. Paragraph 1.2?
 14 Q. Sure.
 15 A. Yes, I have that.
 16 Q. And the BD - I'm sorry. The Johns Hopkins patent
 17 rights include patent rights to the patent - the patent,
 18 '680 patent, and also other patent applications;
 19 correct?
 20 A. Let's see. It talks about the '680 patent. Yes.
 21 Again, I would have to read through this. I apologize to
 22 the jury.
 23 There's lots of detail wording here and I want
 24 to make sure I get the exactly right answer.
 25 So, yes, I see the '680 patent.

1 Q. And there's also a -
 2 A. And - yes. And U.S. application, et cetera.
 3 Q. There's also another patent application there that
 4 is entitled, quote, release of cells from affinity
 5 matrices?
 6 A. Yes.
 7 Q. That's the chymopeptin patent application, to
 8 your understanding?
 9 A. Yes. I can assume it is.
 10 Q. Under this Baxter BD agreement, Baxter Healthcare
 11 acquired rights to not only the Civin patents, which are
 12 at issue in this proceeding, but also another Civin
 13 patent application as well as a BD patent application;
 14 correct?
 15 A. Yes. They were - they were included to make - to
 16 make the negotiations simpler. We included a couple of
 17 other technologies.
 18 - - -
 19
 20
 21
 22
 23
 24
 25

1
 2 Q. Okay. And -
 3 A. And some that we don't use any more.
 4 Q. When you say you don't use any more, what is that,
 5 sir?
 6 A. Our product no longer uses chymopeptin.
 7 Q. Do you see further down it says: "Technology
 8 Paragraph 1.4"?
 9 A. Yes.
 10 Q. Amongst the technology was the hybridomas My-107.
 11 A. Yes.
 12 Q. Also a series of other hybridomas that were
 13 acquired from the Terry Fox Laboratories?
 14 A. Yes. It has them listed here.
 15 - - -
 16
 17
 18
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- 1 Q. And also some secondary hybridomas; correct?
 2 A. I'm kind of slow on reading this.
 4 Yes. That's what it looks like.
 5 Q. And those secondary hybridomas are listed in
 6 Appendix B; correct?
 7 A. Mr. Jansen, you can read a lot faster than I can.
 8 Q. Sure.
 9 A. Bear with me.
 10 (Pause.)

11 THE WITNESS: I don't see where it says
 12 Appendix B, but I'm sure you're right. I see. It's way
 13 over - let me read through that and confirm that.

- 14 BY MR. JANSEN:
 15 Q. I think - I apologize. I think it's probably
 16 Appendix C as opposed to Appendix B.
 17 A. When you said Appendix B, it does have Appendix B
 18 at the top of the next page, a referral to that. Is that
 19 what you are talking about?

20 I'm confused now.

- 21 Q. I'm sorry, sir.
 22 A. If you could help me out.
 23 Q. Sure. If you look near the - near the end of
 24 the agreement, you'll see a reference to an Appendix B.
 25 A. Yes.

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- 1 Q. And then there's a - there are two pages of
 2 Appendix B and then a third page.
 3 A. At the end. Okay. I've got Appendix B. Yes.
 4 Okay. I've got Appendix B. What did you want to know
 5 about that? And that's three pages? Four pages?
 6 Q. Well, it's actually two pages. And then the next
 7 page, it should say Appendix C on the top.
 8 A. Yes.
 9 Q. There's a series of monoclonal antibodies listed
 10 there?

11 A. Well, let's see. In Appendix B?

12 Q. Yes.

- 13 (Pause.)
 14 THE WITNESS: No. No, I don't see an
 15 Appendix B. Where am I - where am I missing?

16 MR. JANSEN: If I may help the witness,
 17 your Honor?

18 THE COURT: All right.

19 MR. JANSEN: Thank you, your Honor.

20 THE WITNESS: Oh.

21 MR. WEISS: Your Honor, one other citation
 22 would be Page 20, Paragraph 33.

23 THE COURT: All right.

24 THE WITNESS: I'm sorry.

25 (Pause.)

- 1 THE WITNESS: Okay. I'm sorry, Mr. Jansen.
 2 You had mentioned that there were two pages in Appendix B
 3 and that's the third page, so that was the confusion.
 4 Yes, I see the antibodies now.
 5 BY MR. JANSEN:
 6 Q. And those antibodies are antibodies, for example,
 7 CD33, CD28, CD -
 8 A. I'm trying to remember exactly what the antibodies
 9 were. There were a number of different ones. And at
 10 this point it has been a while. I couldn't quote
 11 exactly which of these was which antibody.
 12 Q. So you indicated, Mr. Osth, in your direct
 13 examination, that Baxter was paying Becton Dickinson an
 14 11-percent royalty, which was prorated down to about
 15 5 percent, based upon an allocation of some nature?
 16 A. 5-1/2.
 17 Q. For that 5-1/2-percent royalty Baxter was paying
 18 Becton Dickinson, that was for all the rights under the
 19 Baxter/BD agreement; correct?
 20 A. The royalty is for all the rights?
 21 Q. Right.
 22 A. The agreement was centered upon Curt Civin's
 23 technology.
 24 Q. Well, we just went through, Mr. Osth, that we've
 25 not only had a - a Curt Civin patent application -

- 1 A. Yes.
 2 Q. - that was involved in this case, but also
 3 another Curt Civin patent application and a BD patent
 4 application; correct?
 5 A. Yes.
 6 Q. And there was also a series of secondary
 7 hybridomas; correct?
 8 A. Yes.
 9 Q. And those hybridomas went to other markers other
 10 than CD34; correct?
 11 A. Yes.
 12 Q. So that was all part of the - of the agreement
 13 between Baxter and Becton Dickinson; correct?
 14 A. It's important to understand any time an agreement
 15 is put together that you quite often have a major reason.
 16 But for simplicity - I mean, putting together agreements
 17 is not easy to negotiate, not cheap, with all the legal
 18 fees, et cetera.
 19 So it's not unusual to add other items into
 20 any particular agreement, just basically to make it easier
 21 to do.
 22 Q. Okay.
 23 But, to your knowledge, there was never any
 24 apportionment of the rights that Becton Dickinson gave to
 25 Baxter based upon the Civin patent application from the

- 1 BD patent application from the technology; correct?
- 2 A. Do you mean a relative valuation?
- 3 Q. Right.
- 4 A. I know of no relative valuation.
- 5 Q. Okay.
- 6 A. No quantitative relative valuation.
- 7 Q. And for all that technology — well, let me just...
8 Do you see also, Mr. Osthe, that there is
9 an Appendix B, which I think you referred to?
- 10 A. Sorry, Mr. Jansen.
- 11 Q. Sure.
- 12 A. This is where the Fax is doing us in again.
- 13 Q. Is —
- 14 A. Is that the next one, with the logic diagram on
it?
- 15 Q. No. Appendix B, two pages.
- 17 A. Sorry. Yes. Appendix B.
- 18 Q. Yes.
- 19 In there, it's an identification of a series
20 of property transferred from Becton Dickinson to Baxter?
- 21 A. Yes.
- 22 Q. It had to do with hybridoma cell lines,
23 manufacturing procedures, quality control procedures;
24 correct?
- 25 A. Yes.

- 1 Q. And that was all part of this agreement between
2 Becton Dickinson and Baxter?
- 3 A. Yes.
- 4 Q. So, in summary, for the Johns Hopkins patent
5 application which eventually became Dr. Civin's patent,
6 for the other Johns Hopkins chymopain patent
7 application, for the BD patent application, for the
8 technology, for the secondary hybridomas, all of that was
9 all part and parcel of the Becton Dickinson/Baxter
10 agreement; correct?
- 11 A. That was in this agreement.
- 12 Q. And for that entire amount of information, it
13 was — Baxter paid Becton Dickinson \$1.25 million;
14 correct?
- 15 A. That was the initial payment, yes. That was the
16 first payment.
- 17 Q. And for all of that technology and all that
18 information and manufacturing information, Baxter had
19 agreed to pay Becton Dickinson an 11-percent royalty;
20 correct?
- 21 A. 11 percent with the — based on 50 percent or a
22 5-1/2-percent royalty on CDR4.
- 23 Q. Now, it's true, isn't it, that there was not any
24 financial analysis done by Baxter at the time that it
25 acquired the rights from BD to determine what amount

- 1 should be paid as an up-front payment; correct?
- 2 A. Right.
- 3 Q. And the reason why there wasn't any financial
4 analysis done is that there is really no effective way to
5 do a realistic evaluation on something in an early
6 development stage; correct?
- 7 A. That's correct.
- 8 Q. Do you have exhibit — Defendant's Exhibit No. 330?
- 9 A. Let me see. 330?
- 10 Q. Yes.
- 11 A. Yes, I do.
- 12 Q. And do you recognize this as the Becton Dickinson
13 European patent application under which Baxter had
14 rights?
- 15 A. I — boy, I'd have to look through this. It is
16 certainly an European — it's an application to the
17 European Patent Office. It is a European application.
- 18 Q. Do you see the priority? It says U.S. No. 517101.
- 19 A. No.
- 20 Q. Sure.
- 21 A. Yes. I see it now.
- 22 Q. And your recollection is that that is the patent
23 application that Becton Dickinson gave Baxter worldwide
24 rights to?
- 25 A. I think that's the same number. I'm not — when it

- 1 comes to the detailed numbers, Mr. Jansen, it's a little
2 bit of a stretch for me. Bear with me on that.
- 3 Q. Now, please refer, Mr. Osthe, to Paragraph 4.5 of
4 the agreement.
- 5 A. Okay.
- 6 MR. ELLIS: Objection, your Honor. 602,
7 foundation.
- 8 THE COURT: Overruled.
- 9 (Pause.)
- 10 THE WITNESS: Paragraph 4.5? I don't have
11 numbering like that at all on mine.
- 12 BY MR. JANSEN:
- 13 Q. This is Plaintiffs' Exhibit No. 674. It's Paragraph
14 4.5.
- 15 A. Okay. I'm sorry. I was still on 330. Did you say
16 674?
- 17 Q. I apologize, Mr. Osthe.
- 18 A. Okay. Thank you. Please, I'm kind of slow today, so
19 bear with me.
- 20 Okay. I am now with 674.
- 21 Q. And do you see there that Baxter was required,
22 under Paragraph 4.5, to make an annual report to Becton?
- 23 A. Paragraph 4.5?
- 24 Q. Right.
- 25 A. It says, Baxter shall make an annual report to

- 1 Becton. Yes.
- 2 Q. And has Baxter made those annual reports to Becton?
- 3 A. No, I don't think we have. We're bad boys. We -
- 4 I don't think we've made all of those.
- 5 Q. Would you please briefly, Mr. Ost, look at
- 6 Paragraph 5.2.
- 7 A. 5.2? Yes.
- 8 Q. And do you see, it discusses that if Baxter obtains
- 9 FDA approval, it shall make a payment of \$750,000 to
- 10 Becton Dickinson?
- 11 A. Yes. That's what it says.
- 12 Q. And Baxter hasn't made that payment yet, correct,
- 13 because it hasn't received FDA approval yet; correct?
- 14 A. That's correct.
- 15 Q. And -
- 16 A. We will be very shortly. ^
- 17 Q. Okay.
- 18 And that payment is fully creditable, correct?
- 19 Against future royalties?
- 20 A. Yes. Well, and there's some ratios.
- 21 Q. Would you please take a look at Paragraph 5.6 of
- 22 the agreement?
- 23 A. Once again, you show you can move faster than I can.
- 24 Q. It's about two pages later, Mr. Ost.
- 25 A. Okay. I'll tell you - it's on Page 10?

- 1 Q. It begins on Page - it begins on Page 10, yes.
- 2 A. Yes. What's - the left hand - the very left-hand
- 3 column is blanked out, so I can't tell exactly where 5.6
- 4 starts.
- 5 Q. Okay.
- 6 A. If you can give me the first few words...
- 7 Q. Sure. At the top, it says Cells price of each
- 8 licensed product.
- 9 A. Got it. Yes.
- 10 Q. Near the bottom, there's a sentence - the second
- 11 sentence up from the bottom.
- 12 A. Okay.
- 13 Q. It states:
- 14 "In the event that Baxter
- 15 demonstrates to Becton that the Paragraph
- 16 5.5 provision for the minimum royalty
- 17 base of 50 percent or \$1,500 per kit or
- 18 system has become commercially
- 19 unreasonable, Becton and Baxter shall
- 20 negotiate in good faith to agree to a
- 21 commercially-reasonable minimum royalty
- 22 base."
- 23 Do you see that?
- 24 A. Yes.
- 25 Q. And that was a material provision in this

- 1 agreement?
- 2 A. Every provision is important in any agreement.
- 3 Q. You indicated that at a point in time there is a
- 4 rate drop in the Becton Dickinson/Baxter agreement?
- 5 A. Yes.
- 6 Q. And that rate drop occurs at about the five-year
- 7 mark?
- 8 A. Yes. And it depends upon commercialization and
- 9 particularly the geography, et cetera. There's -
- 10 it's - kind of like everything, we certainly have ways
- 11 of making things more complicated than they need to be.
- 12 But it depends upon the geography. But at the five-year
- 13 point after commercialization, which means local
- 14 regulatory approval, there's a step-down.
- 15 Q. And you indicated the Isolex 50 product was sold
- 16 when, sir?
- 17 A. It started in 1993.
- 18 Q. And -
- 19 A. Yes. 1993.
- 20 Q. And so with regard to the Isolex 50 product, the
- 21 rate steps down in about 19 -
- 22 A. What Mr. Jansen are referring to are Isolex 50.
- 23 The 50 ml. size is for research products. The royalty
- 24 that Mr. Jansen has just been referring to now is on
- 25 human therapeutic products, which is our 300 product.

- 1 The royalty base is different. We are not basing -
- 2 we're basing the royalties or the - the 8 percent or -
- 3 or 16 percent - I apologize for all this math, but
- 4 that's the way it works out - is a human-based product.
- 5 Our Isolex product is not designed for the human market.
- 6 Q. And so consequently with regard to the Isolex 50
- 7 product, the rate drop at the end of five years does not
- 8 apply; is that your testimony?
- 9 A. It's the research market, Mr. Jansen. I'm not
- 10 absolutely sure of the royalties on research market.
- 11 There are different provisions for that.
- 12 Q. Now, you indicated that the Isolex 300 product
- 13 was first sold in about February of 1993?
- 14 A. No. I'm sorry. The Isolex 300 product was first
- 15 sold in Europe in January or February of 1995.
- 16 Q. And so the five year period of time for that
- 17 product has commenced to run; correct?
- 18 A. That's - for that geography.
- 19 MR. JANSEN: Your Honor, there are - your
- 20 Honor, there are a series of documents that Mr. Ware
- 21 raised prior to the end of the break that I would plan to
- 22 go into, but I won't at this point. I think I will have
- 23 at least some additional questions of Mr. Ost.
- 24 THE COURT: That is, you'll skip by them and
- 25 we'll talk about it during the break?

1 MR. JANSEN: Thank you, your Honor.
 2 THE COURT: All right.
 3 BY MR. JANSEN:
 4 Q. Now, there came a time, did there not, sir, when
 5 Baxter approached Becton Dickinson with regard to
 6 sub-licensing rights? And, indeed, you testified with
 7 regard to those sub-licenses in your direct examination;
 8 correct?
 9 A. Yes, I did.
 10 Q. And would you please take a look at Defendant's
 11 Exhibit No. 1159?
 12 A. 1159?
 13 Q. Yes, sir.
 14 A. Okay.
 15 Q. And that's a letter dated November 27th, 1991?
 16 A. Yes, it is.
 17 Q. And it's signed by a Michael C. Schiffer
 18 (phonetic)?
 19 A. Yes.
 20 Q. And Mr. Schiffer is the Associate General Counsel
 21 for the Immunotherapy Division?
 22 A. He - Mike Schiffer's role at the time of this -
 23 and he signed it in this letter as Assistant General
 24 Counsel. I'm not sure what the difference between
 25 Associate General Counsel and Assistant General Counsel

1 Q. And under that Subparagraph (2), do you see that?
 2 A. Yes.
 3 Q. The first sentence says:
 4 "Baxter will agree to make available
 5 a single sample of the CD34-producing
 6 hybridoma to each sub-licensee."
 7 Do you see that?
 8 A. Yes.
 9 Q. And the last sentence says:
 10 "Thereafter, Baxter will not be
 11 obligated to provide any additional
 12 samples and the sub-licensee will have
 13 no recourse against Baxter for providing
 14 the sample."
 15 Do you see that?
 16 A. Yes.
 17 Q. Okay.
 18 And that was what Baxter was telling Becton
 19 Dickinson they were going to offer to the sub-licensees?
 20 A. One more time, Mr. Jansen.
 21 Q. Sure.
 22 A. I'd have - I'd really have to read this letter.
 23 It has been - my feeble old mind can't remember all of
 24 these things. I can't remember specifically.
 25 Q. The last sentence of that states:

1 is. But he reports into our Corporate Legal staff, but
 2 was spending much of his time with the Immunotherapy
 3 Division at that time.
 4 Q. Okay.
 5 And do you understand Defendant's Exhibit
 6 No. 1159 to be a letter in which Mr. Schiffer was
 7 advising Mr. Hallenbeck that Baxter was considering
 8 granting some sub-licenses?
 9 A. Again you, again, proof beyond any shadow of a
 10 doubt that you can read faster than I can.
 11 I'm not - I have seen this letter. Boy,
 12 it's been a long time. I'd have to read through it and
 13 make sure that that is what it was doing.
 14 Is that what you'd like me to do, is to read
 15 the letter?
 16 Q. Well, we don't want to spend a lot of time with Mr.
 17 Ost, but let me just refer you to the last sentence of
 18 the first paragraph.
 19 A. Okay. Thank you.
 20 Q. And it says:
 21 "The following generally outlines
 22 Baxter's proposed sub-license arrangement
 23 for the CD34-plus technology."
 24 Do you see that?
 25 A. Yes.

1 "Baxter will not provide any other
 2 technical know-how concerning use of
 3 CD34 nor provide access to other
 4 hybridomas/antibodies which may be
 5 necessary to develop a bone marrow
 6 purging process."
 7 Do you see that?
 8 A. No.
 9 Q. It's the very last sentence on the first page.
 10 A. Very last sentence on the first page. It starts
 11 with "Baxter".
 12 Q. Baxter will not provide any other technical
 13 know-how.
 14 A. Sure. Could you read it again?
 15 Q. It says:
 16 "Baxter will not provide any other
 17 technical know-how concerning use of
 18 CD34, nor provide access to other
 19 hybridomas/antibodies which may be
 20 necessary to develop a bone marrow
 21 purging process."
 22 A. Yes. That's what it says.
 23 Q. And that was also what Baxter was going to - was
 24 telling Becton Dickinson it was going to do in connection
 25 with sub-licensing the rights that Baxter had acquired

1 from Becton Dickinson?
 2 A. And, once again, I will repeat my statement: That
 3 I can't absolutely confirm or deny. I don't know what -
 4 without looking over this letter. This is - this is
 5 now, what, six years ago, almost six years ago this
 6 letter was written and it actually again preceded my time
 7 at Immunotherapy.

8 I've got to go back to the far reaches. I
 9 know I've seen this letter before, but I'd have to go
 10 back and make sure I had the exact purpose of the letter.
 11 Mr. Jansen. So I'm not going to be able to answer
 12 your - your question definitively.

13 Q. Okay.

14 Let's refer briefly, Mr. Osth, to the second
 15 page of the document.

16 A. Mm-hmm.

17 Q. The last paragraph. It says:

18 "Baxter intends to initiate
 19 discussions with Applied Immune Sciences
 20 and CellPro after receiving Becton
 21 Dickinson's approval for granting
 22 sub-licenses."

23 Do you see that?

24 A. Yes, I do.

25 Q. And you understood that Baxter was going to

1 Q. Right.
 2 A. Yes.
 3 Q. Okay. And this is the letter from Baxter?
 4 MR. WARE: Your Honor, this is, in fact, one
 5 of the documents that we were discussing.
 6 MR. JANSEN: I don't think so.
 7 MR. WARE: I'm sorry. I'm sorry.
 8 THE COURT: 1148.
 9 MR. JANSEN: I think it's different.
 10 MR. WARE: We were mistaken.
 11 MR. JANSEN: It's 232, I think.

12 BY MR. JANSEN:

13 Q. And this is the Baxter letter to Systemics with
 14 regard to initiating licensing discussions?
 15 A. It appears - that's what it appears to be.
 16 Q. And you indicated that there were discussions -
 17 between Baxter and Systemics; correct?

18 A. There were discussions with Baxter and Systemics
 19 for a long period of time, yes. And continue to be.
 20 Q. Now, do you see near the bottom of the page, it
 21 says - actually, the last paragraph, Mr. Osth?

22 A. Yes.

23 Q. It says:

24 "Baxter has also licensed under
 25 technology direct to a subset of CX34-plus

1 approach both AIS and CellPro with regard to licensing?

2 MR. ELLIS: 602, your Honor. Objection.

3 THE COURT: Can you read the question

4 back again?

5 (The Court Reporter then read back the
 6 pending question.)

7 THE COURT: I'll allow the question and
 8 answer.

9 THE WITNESS: And then would you please repeat
 10 the question?

11 MR. JANSEN: Sure, Mr. Osth.

12 BY MR. JANSEN:

13 Q. You understood that Baxter was going to approach
 14 both CellPro and AIS for licensing; correct?

15 A. I can only state what's in here. And that's
 16 exactly what it says here. Intends to initiate
 17 discussions.

18 Q. And, indeed, I believe you indicated in your direct
 19 examination that Baxter did, in fact, initiate
 20 negotiations with Systemics; correct?

21 A. Yes, we did.

22 Q. And would you please take a look at what we've
 23 marked for identification as Defendant's Exhibit No.
 24 1148?

25 A. 1148? This is a letter dated 13 January 1992.

1 population having the fine type
 2 CX34-plus/CX38-minus."

3 Do you see that, sir?

4 A. Yes, I do.

5 Q. And you testified with regard to that in your
 6 direct examination; correct?

7 A. I - I think I said that we were licensed, yes.

8 Q. Okay.

9 Well, you also indicated that Systemics was
 10 go - was looking towards a field which was a smaller

11 population within the CX34 population; correct?

12 A. Yes, but not specifically the CX34-plus/38-negative.

13 It's a - it's a scientific subtlety.

14 Q. Now, that paragraph further goes on to say:

15 "A patent application claiming
 16 this cell population is pending."

17 Do you see that?

18 A. Yes.

19 Q. And it says:

20 "This patent application includes
 21 support for the CX34-plus lineage,
 22 negative population, recited in your
 23 recently-issued U.S. patent. Becton
 24 Dickinson and Company, the owner of
 25 this patent application, has filed a

1 request with the Patent Office to
 2 declare an interference between certain
 3 claims of your patent and its patent
 4 application. We would be interested in
 5 discussing this matter with your
 6 company."

7 Do you see that?

8 A. Yes.

9 MR. ELLIS: Objection. 401, your Honor.

10 THE COURT: Can you read that back?

11 (The Court Reporter then read back the last
 12 question.)

13 THE COURT: And can you identify for me in
 14 the pretrial order or in the report what that testimony
 15 would be relevant to?

16 MR. JANSEN: Yes. This has to do with Mr.
 17 Osth testified regarding the Systemics license and those
 18 negotiations. And I would submit, your Honor, this
 19 deals with the question of what Baxter said to Systemics
 20 in connection with those negotiations, and why -

21 THE COURT: I'll allow it. I'll allow it.

22 THE WITNESS: Okay. I see this paragraph.

23 BY MR. JANSEN:

24 Q. And so -

25 A. Is there a further question?

1 and I'm pleased to say that our relationship with
 2 Systemics is a very close and a very good one, where we
 3 exchange a number of pieces of information I think are
 4 very valuable for both of us.

5 BY MR. JANSEN:

6 Q. Okay. But all these negotiations and all these
 7 other things, Mr. Osthe, these were all part and parcel of
 8 the negotiation between Systemics and Baxter with regard
 9 to the license that Systemics eventually took; correct?

10 A. I - well, what I'm having a little bit of trouble
 11 with, Mr. Jansen, is, when - it's hard to say when one
 12 discussion starts and another one stops, and that's what
 13 I was trying to portray. There are a wide range of
 14 subjects. I can't answer that question yes or no.

15 (Pause.)

16 MR. JANSEN: There are, again, your Honor,
 17 a series of additional documents I would go through at
 18 this point in time.

19 THE COURT: You'll wait until after the
 20 break?

21 MR. JANSEN: Yes.

22 THE COURT: All right.

23 BY MR. JANSEN:

24 Q. Now, briefly, Mr. Osthe, you testified with regard
 25 to the Systemics agreement; correct?

1 Q. Yes. You understand what a patent interference
 2 is; correct?

3 A. Yes.

4 Q. Okay.

5 And Becton Dickinson had filed a patent
 6 interference between a Becton Dickinson patent
 7 application and a Systemics patent application or
 8 patent; correct?

9 A. Yes. That's what it says.

10 Q. And so part of the offer letter to Systemics,
 11 which eventually resulted in the Baxter Systemics
 12 sub-license agreement, was a consideration of what to
 13 do about this Becton Dickinson/Baxter interference;
 14 correct? I'm sorry. Becton Dickinson/Systemics
 15 interference; correct?

16 MR. ELLIS: Objection. 602 and unclear.

17 THE COURT: Overruled. You can cover that
 18 in redirect.

19 THE WITNESS: The - the discussions with
 20 Systemics which have been ongoing since before this
 21 letter of January of 1992 have covered a wide range of
 22 subjects.

23 The specific negotiations which I think Mr.
 24 Jansen is discussing were aimed at the CX34 license.
 25 But there have been a wide range of issues of all sorts

1 A. Did I testify about the Systemics agreement?
 2 Q. Right. That was part of your direct examination;
 3 correct?

4 A. Oh, yes. It absolutely was.

5 Q. And that document was marked as Plaintiffs'
 6 Exhibit No. 420. Unfortunately, it's both Plaintiffs'
 7 Exhibit No. 420 and Defendant's Exhibit No. 836. So
 8 would you please refer to the tab that says 836?

9 A. Okay.

10 MR. ELLIS: Might I make a suggestion, your
 11 Honor? I think it may be confusing for the jury if there
 12 are references to different exhibit numbers that relate
 13 to the same exhibit number, and - the same exhibit.
 14 And what I suggest is that whichever the first
 15 is referred to, that for consistency, we continue to refer
 16 to that.

17 MR. JANSEN: I'll refer to it as Plaintiffs'
 18 Exhibit No. 420, your Honor.

19 THE COURT: You can do - I would think
 20 either one. They look like a pretty smart bunch to
 21 me. Smarter than me, anyway.

22 MR. JANSEN: I'll try, your Honor.

23 BY MR. JANSEN:
 24 Q. With regard to Plaintiffs' Exhibit No. 420, you
 25 testified concerning that document in your direct

1 examination, sir?
 2 A. This is the agreement with Systemics?
 3 Q. Right.
 4 A. Yes, I did.
 5 Q. As a matter of fact, if you take a look at the last
 6 page of that document, there appears a signature of a
 7 John Osth.
 8 Do you see that?
 9 A. Hey, there it is, right there. Yes, sir. That's
 10 right.
 11 Q. Okay.
 12 And as far as you're concerned, again, all
 13 the provisions in this agreement were material to the
 14 agreement?
 15 A. Yes.
 16 Q. Let's take a look --
 17 A. Some more, some less.
 18 Q. Okay.
 19 Let's take a look at Paragraph 5.4.
 20 A. 5.4.
 21 Q. Do you see that, sir?
 22 A. Yes, I do. On Page 6?
 23 Q. Yes.
 24 A. Okay.
 25 Q. Now, you recognize Paragraph 5.4 as the paragraph

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1 Q. And with regard to your direct testimony, you
 2 indicated, I believe, that that was a prorated amount,
 3 essentially at 50 percent. In other words, there was a
 4 16-percent royalty, but it would only be applied to
 5 roughly half the products. So the effective royalty was
 6 8 percent?
 7 A. That's the most direct way of analyzing it, yes.
 8 Q. And that 8 percent was to be applied to the net
 9 sales price; correct?
 10 A. Yes. Of the product.
 11 Q. Okay.
 12 Let's take a look at the last sentence of
 13 Paragraph 5.4. It says:
 14 "For the purposes of calculating
 15 such net sales price pursuant to this
 16 article, the actual purchase price of
 17 any products purchased from Baxter
 18 under Article 5.2 shall be excluded
 19 from the net sales price of the
 20 combination kit system or service
 21 prior to performing the above
 22 calculation."
 23 Do you see that?
 24 A. Yes, I do.
 25 Q. And so that was an inducement for Systemics to buy

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1 which establishes what rate Systemics will pay Baxter for
 2 the sub-license; correct?
 3 A. Well, right now I just recognize that it's
 4 Paragraph 5.4.
 5 Q. Could you take a minute and read it?
 6 A. Yes. I would like to.
 7 (Pause while the witness reviewed the
 8 document.)
 9 THE WITNESS: Okay. Sorry. I'm also a slow
 10 reader.
 11 BY MR. JANSEN:
 12 Q. Objection, Mr. Osth.
 13 Let's take a look for a second at the term
 14 net sales price.
 15 Do you see that?
 16 A. Yes. About five sentences, six sentences down?
 17 Six lines down?
 18 Q. Okay.
 19 And Baxter -- Systemics is going to pay Baxter
 20 a royalty based upon the net sales price of Systemics
 21 product or service; correct?
 22 A. Of Systemics -- this is of its product. Yes.
 23 Q. You'll agree with that?
 24 A. With -- that -- I'll agree with the statement of its
 25 product, not necessarily its service.

1 product from Baxter and then use that product in its --
 2 in its product, so that the effective royalty rate
 3 would become less than 8 percent; correct?
 4 A. Yes. I'm -- I'm trying to remember the -- what we
 5 were trying to get at here. I'm sure that it was
 6 something along those lines.
 7 Q. This was an inducement to have Systemics buy
 8 products from Baxter that Systemics would then put in
 9 its kit; correct?
 10 A. I think so.
 11 Q. Let's take a look at the AIS agreement, which I
 12 believe you testified also -- to also on your direct
 13 examination.
 14 A. Yes.
 15 Q. And that was Plaintiffs' Exhibit No. 421.
 16 Do you see that, sir?
 17 A. 421?
 18 Q. Yes.
 19 A. I don't have a 421.
 20 Q. I'm sorry.
 21 A. It's the other system.
 22 Q. Again, it's at 837 in our book.
 23 A. Okay.
 24 Q. But we'll use the designation Plaintiffs' 421.
 25 A. I get my work cut today just moving these things

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1 back and forth.
 2 Okay. I'm with 837 now.
 3 Q. And you indicated that you had negotiations with
 4 AIS; correct?
 5 A. Yes.
 6 Q. And you were personally involved in those
 7 negotiations; correct?
 8 A. Yes, I was.
 9 Q. And as a part of those negotiations, a royalty rate
 10 was determined; correct?
 11 A. Yes.
 12 Q. And in negotiating the license with AIS, you looked
 13 at AIS's ability to pay; correct?
 14 A. Yes.
 15 Q. And in negotiating that license, you also looked
 16 at what the cost - scratch that.
 17 Okay. In negotiating the license with AIS,
 18 you also looked at, among other things, the cost that
 19 you incurred in acquiring the technology that Baxter
 20 was licensing; correct?
 21 A. Say that again, please.
 22 Q. Sure.
 23 A. I want to make sure I get it right.
 24 Q. In -
 25 A. I'm trying to make sure I answer your questions

1 right.
 2 Q. Okay. In negotiating a license with AIS, you
 3 looked at, among other things, the cost that Baxter
 4 incurred in acquiring the technology that Baxter was
 5 licensing; correct?
 6 A. Yes, amongst other things, yes.
 7 MR. JANSEN: Your Honor, this might be an
 8 appropriate time to discuss these other exhibits, if I
 9 could.

10 THE COURT: Well, if you are done, why don't
 11 we have redirect and we'll put the exhibits aside and
 12 then come back; all right?
 13 MR. JANSEN: Sure, your Honor.
 14 THE COURT: All right?
 15 MR. ELLIS: Do I understand the only open
 16 issue on the cross is the documents in question?
 17 MR. JANSEN: There is...
 18 (Pause.)
 19 MR. JANSEN: I believe that is correct, your
 20 Honor. There may be one or two other issues that I would
 21 like to discuss with your Honor prior to asking questions.
 22 THE COURT: All right. Why don't we do
 23 redirect and then we will see where we are.

1
 2 REDIRECT EXAMINATION
 3 BY MR. ELLIS:
 4 Q. Mr. Oath, let me ask you about one of your last
 5 comments, something about the licensee's ability to pay.
 6 Do you remember the question from Mr.
 7 Jansen?
 8 A. Mm-hmm.
 9 Q. If a company came to Baxter seeking a license under
 10 the Civin patents, or any other patent technology, and
 11 said, Well, we'd like to take a license, but we can't
 12 afford to pay anything, so would you give us a license
 13 for a hundred dollars, would you do it?
 14 MR. JANSEN: Objection, your Honor. It
 15 assumes facts not in evidence. Speculation. Lack of
 16 foundation.
 17 THE COURT: Overruled.
 18 THE WITNESS: No.
 19 BY MR. ELLIS:
 20 Q. Why not?
 21 A. Well, the - simply by having the license - let's
 22 take it kind of a - kind of back to the future here a
 23 little bit.
 24 Once you grant a license, that brings
 25 tremendous value to the company that is getting that

1 license. That gives them, plain and simple - if
 2 nothing else, that gives the opportunity to borrow
 3 money or raise money in association with that.
 4 In addition, for all the reasons that I
 5 talked about before, it's important to get an appropriate,
 6 up-front fee. If nothing else, I mean, if a company
 7 can't afford, in the hypothetical situation, \$100 to pay
 8 for a license, they certainly can't afford to take - to
 9 do anything with this technology.

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 2 Q. Mr. Jansen asked you a question about the Systemics
 3 agreement, and specifically Paragraph 5.4 which provides
 4 that effective royalty rate, which I think you said,
 5 works out to 8 percent?

6 A. Yes.

7 Q. Then he asked you about the last sentence of that
 8 paragraph of 5.4, which gives Systemics an option to
 9 buy products from Baxter; right?

10 A. It gives them that option, yes.

11 Q. At this time, there was no requirement that
 12 Systemics buy products from Baxter; right?

13 ***

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1 A. That's exactly right.

2 MR. ELLIS: 1159, please.

3 BY MR. ELLIS:

4 Q. Do you still have Defendant's Exhibit No. 1159
 5 there?

6 A. I think I've got one of everything up here. 1159?

7 Q. Yes.

8 A. Oh, Defendant's. I'm sorry.

9 MR. ELLIS: May I approach the witness,
 10 your Honor?

11 THE COURT: Yes.

12 MR. ELLIS: It will be quicker if I just show
 13 it to him.

14 THE WITNESS: Is this this letter? Yes.

15 I've got that.

16 BY MR. ELLIS:

17 Q. That's the letter in which Baxter was notifying
 18 Becton Dickinson that it might be interested in granting
 19 a sub-license or sub-licenses?

20 A. Yes.

21 Q. I believe you testified you weren't there. You
 22 weren't involved with this group at the time that letter
 23 was sent?

24 A. That's correct.

25 Q. So you don't know anything directly about the

1
 2 A. Certainly no requirement. Certainly no requirement
 3 at all.

4 Q. And as between getting a royalty from Systemics
 5 and selling them products directly, which would you as
 6 a businessman rather do?

7 A. Can you restate that again?

8 Q. Okay.

9 As between taking a royalty from Systemics
 10 on products that it has manufactured, say 8 percent, and
 11 selling them products, as between those two choices,
 12 which would you, as a Baxter businessman, prefer?

13 A. I would much rather sell them a product, and that

14 was what was being envisioned here is that we could sell

15 them potentially a product to use in their process.

16 By the way, I should note in that we would

17 then be paying royalties to Becton Dickinson and, of

18 course, to Dr. Civin, which was — which was critical. So

19 we would get our value that way.

20 Q. And if — if you sold products to Systemics that
 21 were covered by the license agreement, would it be fair

22 for Systemics to pay you a profit on that product and

23 also have to pay a royalty?

24 A. That would not be.

25 Q. Is that why that provision is in there?

1 circumstances of this letter; is that correct?

2 A. I don't know the direct circumstances. That's
 3 right.

4 Q. All right.

5 And do you know anything about the events
 6 that took place with respect to the sub-licenses between
 7 November 1991 and June of 1992, when you joined the
 8 Immunotherapy organization?

9 A. I want to make sure I get the time right.

10 Q. Were you involved in any correspondence or
 11 discussions with potential licensees between the date of
 12 this letter and June of '92, when you came to the
 13 Immunotherapy Division?

14 A. Oh, no, I was not involved in that at all. I was
 15 in Europe, actually running our — running our R&D Center
 16 in Belgium.

17 Q. Does this letter, Defendant's Exhibit No. 1159, ask
 18 Becton Dickinson to agree to reduced royalty rates for
 19 any sub-license?

20 A. I — as I said to Mr. Jansen, I am just reading
 21 this over again. I don't see anything in here that refers
 22 to that.

23 Q. Do you see anything that refers to royalty rates at
 24 all?

25 A. Not at all.

1 Q. Let me ask you to look again at - I believe it's
 2 Plaintiffs' Exhibit No. 674, which is the Becton Dickinson
 3 license to Baxter from August of 1990.

4 A. Yes, I have that.

5 Q. Do you remember Mr. Jansen asked you a series of
 6 questions about that agreement?

7 A. Mm-hmm.

8 Q. And let me ask you to just look again at a passage
 9 that Mr. Jansen asked you about. It's near the bottom
 10 of Page 10.

11 A. Okay.

12 Q. And it says:

13 "In the event that Baxter
 14 demonstrates to Becton Dickinson that
 15 the minimum royalty rate that Baxter
 16 is paying is commercially unreasonable,
 17 then Becton and Baxter will attempt to
 18 resolve that situation."

19 A. Yes.

20 Q. Has Baxter ever asserted to Becton Dickinson that
 21 the rate that Baxter is paying to Becton Dickinson is
 22 commercially unreasonable?

23 A. We have never done that.

24 Q. Let me ask you a couple of questions - more
 25 questions about the license agreement. And if you don't

1 series of questions with you, talking about all of the
 2 various things that Becton - sorry - that becomes
 3 licensed under this license.

4 Let me ask you this: If Baxter threw away
 5 whatever it got the day after this agreement and decided
 6 to use a CD34 antibody that it acquired from some other
 7 researcher in its stem cell products, what royalty rate
 8 would Baxter be paying to Becton Dickinson?

9 A. The same royalty rate that's written in this
 10 agreement, which is the 16 percent and 8 percent.

11 Q. I think you may have misspoken about the royalty
 12 rates in the Baxter/BD agreement.

13 A. I'm sorry. Yes. I certainly did. The - it's the
 14 11 percent and 5 1/2 percent. Sorry. Thank you.
 15 Q. So even if Baxter never used anything that it got
 16 from Becton Dickinson, is it your understanding that
 17 Baxter would still be obligated to pay a 5.5-percent
 18 royalty rate just if it used any CD34 antibody?

19 A. We would be obligated under those terms to pay the
 20 5.5 percent.

21 There's a little bit of going on here of -
 22 it's a little bit like when you buy a car and the guy says,
 23 I got the car you want, but it's got everything on it
 24 except I've also got pin stripes and undercoating on it
 25 and you say, Well, I don't want those.

1 know the answer, or don't remember it, just tell me.
 2 You recall you testified to Mr. Jansen that
 3 there - this agreement called for a total up-front
 4 payment of \$2 million?

5 A. Yes. In two parts.

6 Q. In two parts. Right.

7 An initial one of a million and a quarter
 8 dollars?

9 A. Yes.

10 Q. And then a second one of 750,000 down the road,
 11 when Baxter got FDA approval in the United States?
 12 A. Correct. FDA approval.

13 Q. And Mr. Jansen pointed out to you that the second
 14 up-front payment was creditable against royalties?

15 A. Yes.

16 Q. Do you know whether the up front - the first
 17 up-front payment of a million and a quarter was
 18 creditable against future royalties? In other words,
 19 were they provided a credit? If you don't know -

20 A. I don't know.

21 Q. - the agreement speaks for itself if you don't
 22 know.

23 A. Yes, the agreement speaks for itself.

24 Q. Okay.

25 You remember that Mr. Jansen went through a

1 And you say, well - he says, Well, it's got
 2 it on it. So you pay the same price you would if it
 3 didn't have it and you just take those extras, whether
 4 they're worth anything to you or not. And you decide
 5 later on whether you want it.

6 Q. Do you remember - by the way, those - the
 7 preliminary screening document that you were asked
 8 about -

9 A. Yes.

10 Q. - the letter or memo from Dr. Lake that you were
 11 asked about, were you at the Division? Strike that.
 12 Division didn't exist then.

13 Were you involved with this activity at the
 14 time those documents were written?

15 A. No. I was - as you said, I was certainly at the
 16 Division. It hadn't been formed. I also was not
 17 associated with this work at that particular time.

18 Q. All right.

19 You said, in response to a question from Mr.
 20 Jansen, one of the things you do when you are taking a
 21 license, or looking at a license that's being offered to
 22 you, is you sort of evaluate how well it fits in.

23 A. Mm-hmm.

24 Q. How much you need it?

25 A. Yes.

- 1 Q. How much it's worth to you?
- 2 A. Yes.
- 3 Q. All right.
- 4 If you can't carry out your business plan
- 5 without the technology, is it worth something to you?
- 6 A. If you cannot carry out your business plan, it's
- 7 worth an awful lot to you. It may be worth everything.
- 8 Q. Let me just ask you a few questions.
- 9 The easterly part of your cross-examination,
- 10 Mr. Jansen, as I recall it, asked you some questions
- 11 about business plans.
- 12 A. Yes.
- 13 Q. Okay.
- 14 To be able to make a business plan for a
- 15 product line, do you have to know what it is you're going
- 16 to be selling?
- 17 A. You absolutely have to know what it is you're
- 18 selling.
- 19 Q. Do you have to know what it's going to cost you?
- 20 Or some idea of what it's going to cost you?
- 21 A. And that's — and that's — you have to have some
- 22 concrete — or some concept of what it is, something which
- 23 you can grab hold of to — to pin your numbers on, so you
- 24 have some idea how to quantitate it.
- 25 Q. And do you have to know approximately, to the order

- 1 of magnitude, how much it's going to cost you before you
- 2 can figure out what price you might be able to sell it
- 3 for?
- 4 A. You absolutely have to understand that. In fact,
- 5 even more — maybe a little bit more precise than order
- 6 of magnitude, but it's — if you don't understand your
- 7 costs, you have no idea where you're going to be at the
- 8 end — when you get to the end of the rope.
- 9 Q. And so you at least have to have a prototype;
- 10 right?
- 11 A. Yes. They have to have a prototype.
- 12 Q. And can you make any reasonable projection of what
- 13 your sales are going to be if you don't know what your
- 14 selling price is going to be?
- 15 A. That is an essential part. All of this fits
- 16 together, where you need — you need all these building
- 17 blocks put together. You need to understand your costs.
- 18 You need to understand what your selling price is and
- 19 then you can evaluate truly what the market potential is.
- 20 Q. And at some point in time did you — strike that.
- 21 Were some projections put together, sales
- 22 projections, cost projections, profit projections, with
- 23 respect to Baxter's CX34 cell selection products?
- 24 A. Yes, they were.
- 25 Q. All right.

- 1 And to the best of your knowledge, when were
- 2 the first such projections put together?
- 3 A. The — in fact, the specific reason that I came to
- 4 the Division in June of 1992 — again, the Division had
- 5 been formed in roughly November of the previous year —
- 6 was to put together quantitation. And so it was in the —
- 7 in the spring of '93 that we first had projections that
- 8 were — that had been reviewed regarding the profitability
- 9 of these products.
- 10 (Pause.)
- 11 BY MR. ELLIS:
- 12 Q. I think you had said before that in the royalty
- 13 negotiations with Systemics and AIS, that you were looking
- 14 to have a return that was in excess of the rate that you,
- 15 yourself, were going to have to pay to Becton Dickinson;
- 16 is that correct?
- 17 A. Yes.
- 18 Q. And in the circumstances of those particular
- 19 licenses, what was the margin, if you will, or the
- 20 difference between what you were going to get from them
- 21 and what you were going to have to pay Becton
- 22 Dickinson?
- 23 A. The difference was the difference between 16
- 24 percent and 11 percent.
- 25 We would get from our licensees 16 percent on

- 1 the full product and pay 11 percent.
- 2 Now, using 50-percent rule, that would — that
- 3 would ratchet it down to 8 and 5-1/2.
- 4 Q. So, in effect, what you got to keep was the
- 5 2-1/2-percent difference between 8 and 5-1/2 percent?
- 6 A. That's exactly right. It was the 2-1/2-percent
- 7 differential.
- 8 BY MR. ELLIS: No further questions, your
- 9 Honor, until after Mr. Jansen.
- 10 THE COURT: All right. Maybe what we should
- 11 do is take our lunch break now, see if we can resolve the
- 12 issues so we can conclude whatever testimony we need to
- 13 with regard to this witness.
- 14 So we'll take a lunch break now and start
- 15 again at 1:20. All right? And we'll plan on going to
- 16 4:30 today. And I have no further information about
- 17 Monday yet, but I'll let you know as soon as I know.
- 18 Anybody that has a problem with that, just let me know.
- 19 (At this point the jury was excused for a
- 20 luncheon recess and the following occurred without the
- 21 presence of the jury.)
- 22 THE COURT: All right. Go ahead. I guess
- 23 what we want to do is pick up first the documents that
- 24 Mr. Ware identified. You can actually step down.
- 25 THE WITNESS: Just be here at 1:20?

1 THE COURT: Yes.

2 THE WITNESS: Probably?

3 THE COURT: That's no order.

4 THE WITNESS: Okay.

5 (Witness temporary excused.)

6 ----

7 THE COURT: Okay.

8 MR. WARE: The court now has my copy, so I
9 don't have the numbers.

10 THE COURT: He's giving them back.

11 MR. WARE: Good. There are several points
12 I'd like to make about these. These -- there are four
13 letters here, which represent an exchange of
14 correspondence between January 19, 92 and July 1992,
15 between representatives of Baxter and CellPro in -- which
16 reflect some negotiations that occurred at the time which
17 did not result in a license. If they had, obviously, we
18 would not be here today.

19 The first point, really, is that this are
20 irrelevant. Under the Federal Circuit law on damages,
21 the only kind of license or royalty type evidence -- the
22 only type of evidence you can put in is licenses that
23 actually were entered into. This is a -- this is
24 negotiations for a license that wasn't entered into.

25 So it's as if in the Systemics letter that we

1 should not be entered into.

2 THE COURT: I understand what's happening.

3 Defendants are actually offering, I believe defendants
4 are offering this under the theory it's relevant to
5 willfulness. And they've cited the Censtrom (phonetic)
6 opinion for the proposition that the efforts to negotiate
7 a license are factors a jury could look to to determine
8 their intent, whether it's willful.

9 MR. WARE: Is there a memorandum that
10 they've submitted?

11 THE COURT: It's a memorandum they submitted.
12 I go back to the pretrial order. That is, where is it in
13 the pretrial order or some other document that you have
14 disclosed to the other side that you intend to use these
15 documents for that purpose?

16 MR. WEISS: It was certainly some of the
17 exhibits that were part of the pretrial order.

18 THE COURT: All right. But our local rules
19 require each party to submit a statement of facts
20 summarizing the basis for their position. And I think
21 part of what's going on here is that plaintiffs never
22 quite know what your position is.

23 MR. WEISS: Well, if you apply that, I suppose,
24 to the plaintiffs' case, then there wouldn't be anything
25 that would say that they were going to put in evidence

1 saw earlier there had never actually been a license
2 entered into. It is absolutely clear that that evidence
3 would be irrelevant and inadmissible. And so understanding
4 some back and forth that didn't result in a license is
5 just irrelevant in the first place.

6 Secondly, this is at a time when, according
7 to CellPro's own statements in the Washington litigation,
8 which the Court has seen in connection with another
9 matter, CellPro was -- believed that it was under a
10 significant threat of litigation and that circumstance
11 really alters the circumstances of any negotiation, in
12 any event.

13 Further, I think that we -- to get into these,
14 we intrude in a way that is inconsistent with Rule 408,
15 because this is not the end of the exchange of
16 communications between the parties on this subject. And
17 the problem is if you get into it at all, you sort of
18 have -- it is almost inevitable that you ask the next
19 question about, and then what did they say in response
20 to that. And all of a sudden we're into mediations that
21 occurred and private settlement discussions. And so it
22 isn't quite fair to cut anything off at a particular point.

23 And since it seems to me that none of it is
24 relevant at all, in terms of what does it prove about what
25 a reasonable royalty would be, that it is an area that

1 about how good the '204 invention was.

2 THE COURT: I will call balls and strikes

3 that are balls and strikes no matter which side they're
4 coming from. And I just think the problem here is that
5 the -- that the plaintiffs are facing is that there's

6 always a theory of how a fact can be relevant. And what
7 I've been doing for the last couple of years in this case
8 is dealing with arguments about relevance. And I think
9 that's a mistake. I think the real problem is the notice.

10 And I think it's correct, that when we look
11 at case law and we talk about what's relevant to
12 willfulness, what's relevant to licensing, that there is
13 case law out there that supports propositions that some of
14 these facts are relevant under the general totality of the
15 circumstances. But part of the problem is relevant to
16 what? Relevant to a contention the parties made? Relevant
17 to a contention a list of other facts you put the other
18 side on notice you intend to prove. If you don't do that
19 and you don't follow our local rule, which is, for
20 everybody's information, including the Federal Circuit's
21 information, our local Rule 16.4 requires that the
22 parties prepare a comprehensive pretrial order. And it
23 sets out at Subparagraph (d) a number of things that have
24 to be included in a pretrial order, which for the Federal
25 Circuit's information, is required to be filed at least

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1 three business days before the pretrial conference.
 2 And it includes that in the pretrial order
 3 each party has to make a brief statement of what they
 4 intend to prove. And they have to list it in a summary
 5 of the facts they intend to offer into evidence in
 6 connection with that.

7 Now, that supplements the contention
 8 interrogatories that we referred to and it supplements –
 9 and not necessarily supplements, but it also works in
 10 tandem with the requirement of expert reports that each
 11 party discloses, so that before we come into trial here,
 12 each party is fairly on notice of what the other side
 13 intends to contend, what facts they intend to offer into
 14 evidence and how they believe those facts are relevant
 15 to what their contentions are.

16 So that on this issue, to the extent that
 17 this information about negotiations between plaintiffs and
 18 defendants or Baxter and defendant is relevant, it would be
 19 relevant to the subject of willfulness, I take it that's
 20 what it's being offered for. But it would only be
 21 admissible if it's being identified in the pretrial order
 22 that CellPro has fairly show the other side that they
 23 intend to show that there is no willful infringement here,
 24 and as evidence of that, that they had entered into
 25 negotiations.

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1 So I would like to the pretrial order or some
 2 other disclosure before trial to put the plaintiff's fairly
 3 on notice that that was the purpose of this evidence. If
 4 it's not there, I'm not inclined to allow it in.

5 And that's where I think the problem is. I
 6 don't think it's relevant to reasonable royalty.

7 MR. WARE: One other thing on willfulness is
 8 we've talked earlier about various kinds of evidence that
 9 might bear ultimately on the enhancement issue. There is
 10 evidence about conduct of litigation and what-have-you.
 11 And it was my understanding that the Court's view had been
 12 that we were – that before the jury, that we were
 13 circumscribing the evidence to what did CellPro did at or
 14 about the time of infringement in showing that it had a
 15 good-faith basis for believing the patents were invalid.

16 You start talking about did they try to settle
 17 the case in 1994. There's a whole host of other things
 18 one could talk about. I think we've all accepted the
 19 Court's ruling that that type of evidence would be the
 20 second-stage evidence on enhancement. And the Court
 21 indicated that there would be an opportunity to present
 22 that sort of evidence if and when the jury came in with
 23 the finding of willfulness.

24 So I think that if there's any argument for
 25 this at all, it would be deferred until the portion in

1 which we'd present further evidence to the court.

2 THE COURT: I'll tell you what CellPro is saying
 3 is, Look, Judge, you need to revisit that decision because
 4 here's case law that says negotiations on licenses is
 5 relevant to evaluation of intent. And I guess it's also
 6 correct that what I've told the parties is that I'm going
 7 to draw a line in terms of what the relevant time period
 8 is for the purpose of exploring intent, maybe in part
 9 because of the argument that Mr. Ware just made, which is
 10 that if you are going to get into the issue of intent as
 11 you move through time, it gets very complicated to explain
 12 in response arguments about what was going on in 1990,
 13 what was going on in 1992, what was going on in 1994,
 14 what was going on in 1996 and what may have gone on last
 15 week in 1997.

16 But I don't want to get to the timing issue
 17 yet until I see where it is that CellPro has put the
 18 plaintiffs on notice that they intend to – intended to
 19 argue at the trial that the fact that they entered into
 20 negotiations on a license agreement in 1992 is relevant
 21 to show that they lacked the intent necessary to
 22 establish willful infringement.

23 If you can show me that they're on notice of
 24 that, then we'll get to the question of time frame. If
 25 you want the lunch break to think about that, you can,

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1 but each side should assume from now on when people try
 2 to get facts in evidence, people tend to make arguments
 3 to the jury, I want you to have a copy of the pretrial
 4 order next to you to be able to show me where it is you
 5 put the other side on notice about it.

6 I think that's the real issue about what's
 7 going on here, is fair notice.

8 MR. WARE: I think the record should reflect
 9 one other thing, which is this correspondence occurred at
 10 a time when Mr. Osthe was not at the company and the person
 11 who was at the company isn't here to testify.

12 THE COURT: I got those –

13 MR. WARE: This is certainly the first time
 14 that I can recall hearing that this evidence, this
 15 particular evidence was being offered on the subject of
 16 willfulness.

17 THE COURT: The way that would work out as
 18 an evidentiary matter is they may be able to get them
 19 into evidence, in any event, the documents. You're
 20 right, there may be a problem about 602, in terms of lack
 21 of personal knowledge.

22 He's not in the courtroom, is he?

23 It may be a problem about personal knowledge
 24 he may have about the letters but the evidentiary issue to
 25 me is still significant. That is, will they get the

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1 letters in and will they be able to argue to the jury
 2 about the significance of the letters?

3 If they get the letters in, we're going to
 4 need to talk about giving an instruction to the jury that
 5 these letters aren't relevant for the purpose of
 6 calculating reasonable royalty, but they're relevant to
 7 the subject of willfulness.

8 But if we just say, the issue is will they get
 9 the letters into evidence, I still think I'm on the right
 10 page, which is have they put you on notice that they
 11 intend to argue to the jury that the negotiations in 1992
 12 are relevant for the purpose of evaluating intent as to
 13 willfulness.

14 And with regard to royalty, I'm content to
 15 understand that the way that the defendants approached
 16 the pretrial order, which I don't agree with, is to adopt
 17 the report. If about that, that does not make a whole lot
 18 of sense, because the pretrial order requires you to
 19 identify facts you're going to rely on. It's sort of a
 20 back-door approach to rely on experts' summaries and not
 21 what the facts are that you intend to offer at trial.

22 But where we are is, we've got Kiley's report
 23 which serves the same purpose and I'm willing to let it
 24 go here. It puts the other side on notice. I don't know
 25 what you put the other side on notice on with regard to

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1 the contentions you intend to make about willfulness. And
 2 if you've got a report that satisfies the same type of
 3 thing that Mr. Kiley's report does, then I'll look at that
 4 and we can use that as a baseline for whether you put the
 5 other side on notice as to it or not.

6 MR. JANSEN: If I may ask a question with
 7 regard to my continuation of Mr. Ost's testimony...

8 As I recall, he testified extensively about
 9 Baxter's close to getting FDA approval and Baxter has
 10 these great products that are going around the world
 11 and treating patients and submissions to the FDA.

12 Now, I did not go into those, your Honor,
 13 because of your Honor's comments during the course of my
 14 examination. But in terms of cross-examination, if they
 15 want to open the door to that, your Honor, if they want
 16 to try and tell the jury that Baxter is providing all of
 17 these great benefits to mankind, we have documents, your
 18 Honor, that we would like to present with Mr. Ost, to
 19 show that perhaps Baxter is not doing what they've
 20 suggested to the jury that they are doing.

21 Now, all I'm asking, your Honor, is that if
 22 they're going to open the door on it, that we be allowed
 23 to respond.

24 THE COURT: I understand. If they fairly open
 25 on direct an issue that you want to cross on for the

1 purpose of impeachment, then we can explore that.
 2 MR. WARE: Your Honor, if I could just comment,
 3 the -- this subject is not a subject that we ever intended
 4 to present in this trial. And the only reason it is
 5 presented is because Mr. Bloomberg, in his opening, stood
 6 in front of this jury and said, CellPro has an FDA-
 7 approved product and Baxter doesn't, and they've got no
 8 hope of having one. And so that's what led to this.

9 We filed a motion in limine that was heard
 10 on Monday, asking that none of this evidence could come
 11 in.

12 THE COURT: Well -

13 MR. WARE: So I don't think -

14 THE COURT: I've indicated that from now on
 15 everybody should have a copy of that pretrial order in
 16 front of them. You can have your Answers to
 17 Interrogatories. You can have your expert reports. But
 18 if it is not disclosed, as required by our local rule,
 19 which I intend to enforce, then it does not come in. And
 20 if we have a list of items that I will correct before the
 21 jury begins its deliberations, I'll do that.

22 But back to the little -- the little subject
 23 matter you just raised, which is it's correct that if a
 24 matter is raised on opening, you should be entitled to
 25 cross with regard to matters of impeachment. And if it's

1 matters of relevance, you think I'm unfairly cutting you
 2 off, then let's identify them in a specific factual
 3 context and we'll see what to do about it.

4 MR. JANSEN: I've got one instance, your Honor,
 5 where Dr. Civin in his direct examination said, but
 6 basically you could find, then, take this cell, grow it
 7 into a tissue culture and make an unlimited supply of just
 8 this antibody, CD34 antibody in this case which we named
 9 My-10. You could then put the cells or antibody in the
 10 freezer and pass it around the world and have it be
 11 manufactured in huge quantities to be useful for research
 12 not only in my lab but around the world and be useful for
 13 patients.

14 You've got Dr. Civin telling the jury he's
 15 got this great antibody that's going to be useful for
 16 the treatment of patients. And now, your Honor, we have
 17 a different view of that. But we understand -

18 THE COURT: No, but, see, that's actually not
 19 a bad example. You can cross him on that for the purpose
 20 of impeaching him. The question that I keep going into
 21 is you want to cross him to impeach him and turn around
 22 and use it on the licensing evidence. And that's improper.
 23 You can't -- I'm not going to allow you to draw out facts
 24 in one context and use them for another purpose in another
 25 theory.

1 You're on notice of that. And I will hold you
 2 to what's in the pretrial order. Each party is fairly
 3 entitled to test testimony and impeach testimony. And if
 4 you show me that you are proceeding in good faith in
 5 impeachment, that's fine. But you have to, consistent
 6 with the Rules of Civil Procedure and our local rules,
 7 Federal Circuit, you need to pay attention to our local
 8 rules and the requirements in our court order that set
 9 out exactly what it is you're required to do before you
 10 come into court.

11 And trial by ambush isn't fair to either party.
 12 If we're going to have structure in the case, if you've
 13 got theories in your case, you should do what you've done
 14 with Mr. Kiley's report, which is lay out what your theory
 15 is and then ride it.

16 Okay. I'm going to take a break. Be back.
 17 (Luncheon recess taken at 12:35 p.m.)

18 ***

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1
 2 AFTERNOON SESSION
 3

4 (Proceedings reconvened at 1:20 p.m.)

5
 6 THE COURT: Bring the jury in.
 7 Go ahead.

8 MR. WARE: We wondered about a couple of things
 9 that we've asked for: The documents of Mr. Kiley, as well
 10 as the financial - additional financial data to bring the
 11 sales up to date. We are going to be putting Dr. Haussman
 12 on this afternoon.

13 THE COURT: Okay.

14 MR. BLOOMBERG: I can respond to at least part
 15 of that, your Honor. With respect to the documents on
 16 Dr. Kiley, we had Jerry Reilly from our office here on a
 17 couple of occasions, but other matters have precluded me
 18 from talking, so it might be beneficial to schedule the
 19 time I think we could have him here and address that
 20 subject.

21 THE COURT: The answer is you don't know
 22 where the documents are?

23 MR. BLOOMBERG: No. We have the documents
 24 here.

25 THE COURT: Good. Why don't you have them

1 delivered over. Then I can look at them.

2 MR. BLOOMBERG: Okay. In fact, I think we
 3 have them here in the courtroom.

4 THE COURT: Why don't you pass them up?
 5 MR. JANSEN: I have many documents to go
 6 through with Mr. Ost. I would suggest many of those
 7 documents deal with the hypothetical negotiation and
 8 the state of technology as of the date of that hypothetical
 9 negotiation. If we went through some of those - I would
 10 ask to do that again. At this point in time, I understand
 11 your Honor's directions to the parties.

12 THE COURT: Well, you can go ahead and ask
 13 him the question as long as somebody is around to show
 14 me what paragraph it relates to and I'll make rulings
 15 based on the paragraph.

16 MR. WEISS: Your Honor, in that regard, with
 17 respect to the negotiations between Baxter and CellPro,
 18 you will note that in Mr. Kiley's expert report, he
 19 incorporates his testimony from the previous trial. And
 20 it was the subject of some of his testimony in that
 21 previous trial.

22 MR. WARE: He is not testifying on willfulness,
 23 which is the only issue.

24 The other thing I will say is I've looked at
 25 the Kingview/Terry case which they cite. The

1 negotiations there had to do with negotiations prior to
 2 the time of infringement. And that's consistent with
 3 the proposition that that is the period you focus on.

4 THE COURT: All right. Where are the
 5 financial documents?

6 MR. BLOOMBERG: I'll hand them up, your Honor.

7 THE COURT: Pardon?

8 MR. BLOOMBERG: I'll get them to you, your
 9 Honor.

10 THE COURT: Those are the -

11 MR. ELLIS: Updated sales data, your Honor,
 12 I've been told that they don't have.

13 THE COURT: You don't have that?

14 MR. JANSEN: We gave them up through
 15 December.

16 THE COURT: You don't have anything past
 17 December? We'll take it up during the afternoon break.
 18 I'll look for the additional documents you're going to
 19 give me and we're ready to go.

20 All right. We're back on cross-examination
 21 again.

22 ***

23

24

25

1 PLAINTIFF'S TESTIMONY CONTINUED
2

3 ... JOHN OSTH, having been
4 previously duly sworn as a witness,
5 was resumed and testified further as
6 follows ...
7

8 CROSS-EXAMINATION
9 CONTINUED

10 BY MR. JANSEN:

11 Q. Briefly, Systemics has not paid any royalties under
12 its license agreement with Baxter; correct?

13 MR. ELLIS: Objection. Outside the scope.

14 THE COURT: Overruled.

15 THE WITNESS: I don't believe they have.

16 MR. JANSEN: Your Honor, I would ask your
17 Honor to look at Mr. Kiley's report, Paragraphs 2, 3 and
18 4 – actually, 2 and 4.

19 THE COURT: All right.

20 MR. WARE: What page, for our benefit,
21 please?

22 MR. JANSEN: 2 and 4.

23 MR. WARE: This is on Page 57.

24 MR. JANSEN: Yes.

25 In that regard, your Honor, I would intend to

1 Q. And do you understand that by this letter,
2 Defendant's Exhibit No. 232, Baxter is offering CellPro
3 some technology?

4 MR. ELLIS: Same objections, your Honor.

5 THE COURT: Same ruling.

6 You can answer.

7 THE WITNESS: I'm sorry, your Honor?

8 THE COURT: You can answer the question.

9 THE WITNESS: Okay.

10 This is an opening – this is a letter
11 opening that would be intended to open a discussion
12 about technology. It is not necessarily an offer of
13 technology, but it would be opening a discussion about
14 that.

15 BY MR. JANSEN:

16 Q. And then with regard to Defendant's Exhibit No.
17 232, the last sentence of the second paragraph, would
18 you please read that?

19 A. The last sentence of the second paragraph:
20 "Xaxter may also provide a single
21 initial viable sample of the CD44
22 hybridoma to CellPro."

23 Q. Was that an offer that Baxter made to CellPro?

24 MR. ELLIS: Objection, your Honor.

25 THE COURT: You can answer.

1 ask Mr. Osthe with regard to No. 232.

2 THE WITNESS: Mr. Jansen, I'm sorry. Which
3 one am I –

4 MR. JANSEN: 232, plaintiff's'.

5 THE WITNESS: Okay.

6 THE COURT: Ask him a question and I'll see.

7 BY MR. JANSEN:

8 Q. Mr. Osthe, do you have in front of you the

9 Defendant's Exhibit No. 232?

10 A. Yes, I do.

11 Q. And would you please take a look at the second
12 paragraph of Exhibit 232?

13 A. Yes. It starts, This license will, et cetera?

14 Q. Right.

15 Now, exhibit – Defendant's Exhibit No. 232

16 is a letter from Baxter to CellPro, dated as set forth;
17 correct, sir?

18 A. Yes, it is.

19 Q. And in that letter, Mr. Hayes is communicating with
20 Dr. Porter, correct?

21 MR. ELLIS: Objection, your Honor. 602, 401
22 as well.

23 THE COURT: All right. For the moment, I'll
24 allow the question.

25 BY MR. JANSEN:

1 THE WITNESS: The – this whole letter is
2 all – all general statements. There is no specific
3 offer. It's generally discussing we ought to get
4 together and talk. And there's some items identified
5 in there and that's it.

6 BY MR. JANSEN:

7 Q. Okay.

8 Would you please look at Defendant's Exhibit
9 No. 7037?

10 A. 7037? Okay.

11 Q. And this is another memo from Dennis Van Epps
12 (phonetic) to Tim Anderson?

13 A. Yes. I have that one.

14 Q. And it relates, again, to the due diligence that
15 Baxter engaged in with regard to the acquisition of
16 technology from Becton Dickinson?

17 MR. ELLIS: Objection. 602, 401.

18 THE COURT: All right. You can continue to
19 ask the questions. You'll need to establish what
20 personal knowledge he may have of this matter.

21 THE WITNESS: Yes. This is dated May of
22 1990, which is some two years before I joined the
23 Division. In fact, the Division wasn't formed at this
24 time.

25 BY MR. JANSEN:

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1 Q. Okay.
 2 At this point in time, Tim Anderson was head
 3 of the Fenwall Division?
 4 A. Again, I said — before — I believe he was. I am
 5 fairly certain of that. So, yes.
 6 Q. And Tim — and the Fenwall Division at that time was
 7 engaged in research and development with regard to stem
 8 cell selection?
 9 MR. ELLIS: Objection. Foundation.
 10 THE COURT: Can you answer that?
 11 THE WITNESS: My understanding is they were.
 12 But I certainly can't comment on the depth of that work.
 13 BY MR. JANSEN:
 14 Q. Now, please refer to Defendant's Exhibit No. 800.
 15 A. 800? Okay.
 16 Q. And defendant's 800 is a submission by Baxter to
 17 the FDA?
 18 A. That's what it appears to be, yes.
 19 Q. And as far as you know, the statements set forth
 20 by Baxter in Defendant's Exhibit No. 800 are true and
 21 correct?
 22 MR. ELLIS: Objection. Foundation.
 23 Personal knowledge.
 24 THE COURT: You need to ask him what knowledge
 25 he has about the facts set out in there.

1 MR. ELLIS: What exhibit are you referring
 2 to, Mr. Jansen?
 3 MR. JANSEN: 1083.
 4 THE WITNESS: 1083?
 5 MR. JANSEN: Yes.
 6 BY MR. JANSEN:
 7 Q. Do you recognize Defendant's Exhibit No. 1083?
 8 A. I see it's a letter — it's a letter, yes.
 9 Q. Okay.
 10 It's a letter from the Department of Human —
 11 I'm sorry — from Sharon T. Rizzo, from the Department
 12 of Health and Human Services to Dr. Butchco?
 13 A. Yes. That's what it is.
 14 Q. And is it your understanding that this particular
 15 correspondence relates to Baxter's application to the FDA
 16 for approval of its Isoplex product?
 17 A. I don't know. I don't know the specific letter.
 18 I'd have to read it to — and check to determine what
 19 it pertains to.
 20 Q. Just briefly, the first paragraph says:
 21 "We have reviewed the" —
 22 MR. ELLIS: Objection to any reading from the
 23 letter until we have a foundation, your Honor. The letter
 24 is admitted.
 25 THE COURT: Is it otherwise going to be

1 BY MR. JANSEN:
 2 Q. Mr. Osth, have you reviewed the regulatory materials
 3 submitted by Baxter to the FDA?
 4 A. No.
 5 Q. Who handles that within Baxter?
 6 A. Our Regulatory Group.
 7 Q. Do you have confidence in the decision by the
 8 Regulatory Group made to the —
 9 MR. ELLIS: Objection. Time frame.
 10 BY MR. JANSEN:
 11 Q. As of August 1989?
 12 THE COURT: I don't think you're going to
 13 be able to get it that way.
 14 BY MR. JANSEN:
 15 Q. Does the Regulatory Group at Baxter report to you,
 16 sir, within the Immunotherapy Division?
 17 A. The Regulatory Group of the Immunotherapy Division
 18 reports to me today. Yes.
 19 Q. And you were President of the Immunotherapy
 20 Division as of September of 1994?
 21 A. As of September of 1994, yes.
 22 Q. And who is a Dr. Butchco?
 23 A. Dr. Butchco is — is our Director of Regulatory
 24 Affairs. He was. Was our Director of Regulatory
 25 Affairs.

1 as correspondence received by Baxter from the FDA in
 2 connection with Baxter's FDA submission?
 3 A. Oh, I don't know what this has to do with -- as I
 4 said, this is the first I've seen this letter. So I'd
 5 have to read it through and check.

6 Q. Is Dr. Butchko the Director of Regulatory Affairs
 7 and Quality Systems at Baxter?
 8 A. Yes, he is. I'm sorry. I want to be sure. He
 9 used to be. He just moved to another group within
 10 Baxter.

11 Q. Just take a look, briefly, Mr. Osthe, at Defendant's
 12 Exhibit No. 1085.

13 A. 10185? Okay.

14 Q. And this is also a letter to Dr. -- to a Dr. Baker?

15 A. Yes.

16 Q. This is dated about December of 1994?

17 A. Actually, I don't know. It doesn't have a date on
 18 it.

19 Q. On the upper right-hand side.

20 A. I see 6 December. And then the rest of it is
 21 whited out.

22 Q. Perhaps -- this document was produced by counsel.
 23 Perhaps we can get a better copy.

24 A. Okay. I'll assume you're right, then.

25 Q. Somewhere in that period of time?

1 A. Mm-hmm.
 2 Q. And do you recognize the designation BBIDES2727?
 3 A. No, I don't.
 4 Q. What are Dr. Baker's responsibilities?
 5 A. Well, I'm not sure which Dr. Baker they're referring
 6 to here. Oh, I'm sorry. I do see it now. Don Baker.
 7 Don Baker runs the -- is in charge of R&D for our
 8 Highland Division, for Baxter's Highland Division.
 9 Q. And do you know whether Dr. Baker, in the course of
 10 his activities, communicates with the FDA?
 11 A. I can't speak to that. I don't know.
 12 Q. All right.
 13 A. I can only assume he does, but...

14 Q. Let me ask a preliminary.

15 "Question: Did there come a time
 16 when Baxter and CellPro engaged in
 17 negotiations?"

18 MR. ELLIS: Objection, your Honor. Grounds
 19 previously articulated during the break.

20 THE COURT: Do you want to cite to me
 21 something in the pretrial order with regard to that
 22 subject?

23 MR. JANSEN: I believe, your Honor, it would be
 24 in Mr. Kiley's report. And, again, your Honor, it would
 25 fall within Paragraphs 2 and 4 in part.

1 MR. ELLIS: Your Honor, I --
 2 THE COURT: I don't see anything in there
 3 that would relate to that subject.
 4 MR. WEISS: Your Honor, this would be in the
 5 testimony that's incorporated.
 6 THE COURT: That's not good enough notice.
 7 MR. JANSEN: All right.
 8 Your Honor, we'll make our offer with regard
 9 to that at another time.
 10 THE COURT: Okay.
 11 MR. JANSEN: With that, Mr. Osthe, I don't
 12 have any further questions at this point in time.
 13 THE COURT: All right.
 14 Do you have any redirect?
 15 MR. ELLIS: Give me 10 seconds to think, your
 16 Honor.
 17 THE COURT: All right. While you're thinking,
 18 let me talk to the jury for a minute.
 19 MR. ELLIS: All right.
 20 THE COURT: I read to you some material
 21 before the trial began that I call preliminary
 22 instructions that tried to define for you what your job
 23 was. Let me give you a couple minutes about what I see
 24 my job as being. And it's a little bit in connection
 25 with the statement that I made to you about an

1 attorney's obligation to make objections and a little
 2 bit about my role as a neutral arbitrator here.
 3 One thing that happens here is when there's a
 4 dispute between parties, there's facts all out there that
 5 the parties may want to bring into court to present to
 6 you. And there's a couple of things we do in connection
 7 to give some organization to those facts.

8 One is there's a set of Rules of Evidence
 9 that define what facts may be admissible and that you
 10 can rely on in the trial. One of my jobs as a Judge in
 11 the case is to apply the Rules of Evidence to determine
 12 what facts are admissible and what facts aren't
 13 admissible.

14 Sometimes people think it's better just to
 15 say, Tell me the whole story. Let me have all the facts.
 16 But there are a number of principles that I need to apply
 17 to restrict certain facts from coming in. And they're
 18 principles that each side relies on and our system of
 19 justice relies on. And they count on me trying to do it
 20 fairly and as best I can.

21 I have to make certain evidentiary rulings.
 22 The lawyers, I told you, have to make certain objections.
 23 You should not hold it against the lawyers that they make
 24 evidentiary objections and you need to, under the oath
 25 you've taken, abide by the instruction that I gave you

1 that you are to make the judgment based on not just the
 2 facts, but those facts that have been admitted into
 3 evidence.

4 And part of what you have seen here is a
 5 little bit of the parties looking for me to draw the
 6 boundary as to what's admissible evidence and what's going
 7 to come in here. And you need to make sure that, one, you
 8 don't draw any negative inference from an attorney that
 9 makes an objection with regard to their good-faith belief
 10 that information shouldn't be admissible.

11 You should not make any judgment about facts
 12 that are not coming before you, because I've applied the
 13 Rules of Evidence to determine that they are not
 14 admissible, either because they're irrelevant, that is
 15 not relevant, or because of other reasons why you
 16 shouldn't have that information in front of you. Those
 17 policy reasons and reasons in the law are items that we
 18 can talk about outside the context of this case, but in
 19 the context of this case, what we're doing is to try to
 20 get to you the information that's relevant and
 21 admissible. And that's part of what I'm doing here
 22 during this process.

23 All right? Now, did you have any
 24 re-direct?

25 MR. ELLIS: No, your Honor.

1 THE COURT: All right. You may step
 2 down.

3 THE WITNESS: Thank you.
 4 (Witness excused)

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6 MR. ELLIS: Your Honor, our next witness is
 7 doctor Jerry Hausman, who is our damages expert, an
 8 economist.

9 Before we call Dr. Hausman — and this was
 10 an issue that I had wanted, if possible, to take up
 11 during the break — I think it would be helpful to the
 12 jury if the Court were willing to give a preliminary
 13 instruction about the nature of a hypothetical
 14 negotiation and how that place into the determination
 15 of damages in this case, so that we don't have Dr.
 16 Hausman, so to speak, or the lawyers arguing about what
 17 the law is.

18 And also, what the nature of the license is
 19 that's being discussed in that hypothetical negotiation.

20 THE COURT: I think the thing to do is I have
 21 a set of the final instructions that we have talked about.
 22 If you want to read that to the jury yourself and report
 23 to them that I have not finalized that and there may be
 24 some minor modifications to it between now and the end of
 25 the trial. As long as the jury understands that you are

1 making an effort to assist them, I think that would be
 2 fine.

3 MR. ELLIS: All right. I'd appreciate that.
 4 THE COURT: I will hand you a copy I've got
 5 here. You can read it.

6 MR. ELLIS: Thank you, your Honor.
 7 (The court handed documents to Mr. Ellis.)
 8 (Pause.)

9 MR. ELLIS: The reason I'm going to be reading
 10 to you from these preliminary final instructions is to try
 11 to give you a little background to understand the economic
 12 testimony that Dr. Hausman is giving.

13 One of the major subjects of his testimony
 14 is going to be something that's called a hypothetical
 15 negotiation. And the instructions will, I hope, give
 16 you a little guidance about that, as to what that
 17 hypothetical negotiation means, when it takes place in
 18 time.

19 We're talking about an imaginary negotiation
 20 that would have taken place many years ago. In fact, Dr.
 21 Hausman would say, in or about October of 1990. Not a
 22 real negotiation, an imaginary one.

23 And it's also important to understand what
 24 the subject matter of that negotiation is and is not.
 25 The only subject matter of the negotiation is a license

1 to the Civin patents, not other technology, not actual
 2 antibodies.

3 MR. JANSEN: Objection, your Honor.

4 Arguably.

5 MR. ELLIS: I'll stop and read, your Honor,
 6 if you think that's better.

7 THE COURT: That's okay. You can go ahead.
 8 Actually, if you all would like to make a counter-
 9 statement — I don't want to get into arguments.

10 MR. ELLIS: I understand, your Honor. I'm
 11 trying to be as neutral as I possibly can.

12 THE COURT: If counsel wants to make a
 13 comment after this, feel free to do it.

14 MR. ELLIS: I was saying the subject matter
 15 of this hypothetical negotiation is not actual, technical
 16 data, actual antibodies, but just the right to operate
 17 under the Civin patents without being sued, because
 18 that's what a license gives you. It gives you the right
 19 to do whatever you like that is covered by the patent
 20 without fear of being sued.

21 Dr. Hausman is going to talk about a
 22 reasonable royalty. And I'm going to read to you from
 23 the Judge's draft instructions on the subject of a
 24 reasonable royalty. And you heard the Judge say that he
 25 may adjust or make some refinements to those instructions